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In The

Supreme Court of the United States

October Term, 1997

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,

Petitioner,

v.

CITIZEN BAND POTAWATOMI
INDIAN TRIBE OF OKLAHOMA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As a matter of first impression, whether pursuant to the discretionary authority delegated to the Secretary of the Interior in 25 U.S.C. § 465 and the regulations promulgated thereunder, 25 C.F.R. §§ 151.2(f) and 151.8, the Secretary of the Interior can place land in trust for the Absentee Shawnee Tribe of Oklahoma which shares a common former reservation area with the Citizen Band Potawatomi Tribe within the State of Oklahoma without obtaining consent from the Citizen Band Potawatomi Tribe when the Secretary of the Interior has determined that the language and legislative history of the cession acts of both tribes, when considered together with *Shoshone Tribe v. United States*, 299 U.S. 476 (1937), support a conclusion that Congress intended to recognize and confirm rights of the Absentee Shawnee in the Potawatomi reservation?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Absentee Shawnee Tribe of Oklahoma ("AST"), a federally recognized Indian Tribe with a constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501 et seq. (1998),[1] respectfully requests that a writ of certiorari issue to the Court of Appeals for the Tenth Circuit. In its May 5, 1998 Order, the Tenth Circuit Court of Appeals affirmed the holding of the District Court for the Western District of Oklahoma wherein, by grant of summary judgment, it was determined that the Bureau of Indian Affairs ("BIA") was required to obtain the consent of the Citizen Band Potawatomi Indian Tribe of Oklahoma (now known as the "Citizen Potawatomi Nation of Oklahoma") ("Citizen Band") before placing land in trust for the AST within the boundaries of a certain geographic area. The AST has continually asserted in this matter that the provisions of 25 C.F.R. § 151.8 (1997)[2] do not require consent; rather, the Secretary has discretionary authority to define "former reservation area" for purposes of the stated regulations.

OPINIONS AND ORDERS BELOW

The May 5, 1998 Opinion of the United States Court of Appeals for the Tenth Circuit, the subject of this Petition, is

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[1] The AST was not named as a party to this suit in the original Complaint. The AST attempted to enter the case as *amicus curiae* once the Citizen Band was instructed to pursue its administrative remedies before the Interior Board of Indian Appeals ("IBIA"), but was denied without notice. When the case returned to the District Court, the AST sought to intervene to protect its interests to acquire land in trust. The Citizen Band opposed the request; the United States had no objection but suggested that the Court require the AST to waive its sovereign immunity for purposes of this lawsuit. On March 15, 1996, the AST's Motion to Intervene was granted.

[2] Unless indicated otherwise, all references to the U. S. Code will be to the 1998 statutes; all references to the Code of Federal Regulations will be to the 1997 regulations.

reported at 1998 WL 220093 and is reproduced in the Appendix at App. 1-21.[3] The Order of the United States Court of Appeals for the Tenth Circuit denying AST's request for a rehearing is unreported and reproduced at App. 101. The Order of the United States Court of Appeals for the Tenth Circuit granting AST's motion to stay the mandate pending this Petition for Writ of Certiorari until August 3, 1998, is unreported and reproduced at App. 102.[4] Other prior Orders and Opinions of the United States Court of Appeals for the Tenth Circuit, the United States District Court for the Western District of Oklahoma, and an agency decision from the Interior Board of Indian Appeals, Department of Interior ("IBIA"), reported at 28 IBIA 169 (1995), are reproduced at App. 22-100.

JURISDICTION

This Petition is filed within ninety days after the entry of the Opinion in the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 2101(c) and within the time allowed by the Court of Appeals for the Tenth Circuit in its Order granting the AST's Motion to Stay Mandate Pending Petition for Writ of Certiorari. See App. 102 and fn. 4 herein.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The following provisions are significantly involved in this case.

25 U.S.C. § 465, provides, in relevant part, as follows:

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[3] Citations to various Orders or documents in the Appendix throughout this petition will be designated as "App. xxx," with pertinent appendix page numbers. Orders and documents have been consecutively numbered in the Appendix.

[4] By Order dated August 5, 1998, the Tenth Circuit Court of Appeals extended the stay of the mandate until August 13, 1998. The Order was received too late to be included in the Appendix, but a copy of the Order has been provided to the Clerk of the Supreme Court by letter.

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 C.F.R. § 151.2(f), provides, in relevant part, as follows:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma . . . , *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.8, provides, in relevant part, as follows:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

STATEMENT OF THE CASE

At issue in the present case is a matter of first impression concerning whether the Secretary of the Interior ("Secretary") may exercise the discretionary authority vested in the Secretary by 25 U.S.C. § 465, and the regulations promulgated thereunder, to place land in trust for the AST within a "former reservation area" that the AST and the Citizen Band have

historically shared for over one hundred years, without consent from the Citizen Band. The reservation was disestablished by Congress in 1891. The vast majority of land comprising the former reservation has been long alienated to non-Indians. The Citizen Band owns less than 5,000 acres of the original reservation. The Citizen Band owns no interest in the non-Indian owned lands. No lands presently owned by the Citizen Band are at issue here. Inexplicably, other than on vanity grounds, the Citizen Band seeks to prevent the AST from acquiring, for the most part, non-Indian owned, fee simple lands through Department of the Interior procedures. The IBIA, the judicial arm of the Secretary, correctly decided this issue in 1995 and held that the Secretary had consistently treated the former reservation area as a shared former reservation of the two tribes and that nothing in the historical background serves to alter Congress' recognition of the rights of the AST in the area. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169 (1995), App. 53.

The Panel incorrectly states the issue to be whether "the district court erred in ruling that the IBIA decision is contrary to law and in holding, contrary to the IBIA, that the Tribe did not obtain rights in the Potawatomi reservation between June 25, 1890, and the passage of the 1891 Act." App. 15. This gross misstatement by the Panel exhibits a basic confusion concerning the facts of this case and a total misunderstanding of the legislative process necessary to ratify agreements made with Indian tribes. This misstatement by the Panel created a faulty rationale for the case premised on treaty abrogation which is neither briefed nor argued by any party. The question is not whether a separate Absentee Shawnee Reservation was *created* for the AST by the 1891 Act. Rather, the question is whether the Absentee Shawnee had rights in the Potawatomi (Absentee Shawnee) Reservation by virtue of the pre-existing actual possession of land within the same reservation which was confirmed and recognized by Congress prior to and after 1891. This court is asked to determine for the first time the nature of the relationship between the AST and the Citizen Band – two tribes that share a common "former reservation

area" – and the United States with respect to placing land in trust in Oklahoma.[5]

History reveals that the AST settled in the subject lands as early as 1840, approximately thirty years before the Citizen Band appeared. The AST was in open, notorious and actual possession of the subject lands establishing what is known as "aboriginal title" or "Indian title" to these lands. Many years later, the Citizen Band, with the aid of the United States, moved into the same area. This clash between competing lawful occupancies has continued for over 120 years with consistent recognition by the United States of both tribes' rights in the subject area. This century-old disagreement is unusual in the sense that it involves competing Indian claims to the same land rather than efforts to safeguard Indian land rights against non-Indian encroachment. The most important aspect of these circumstances, however, is that unless certiorari is granted, the AST will have no opportunity in this case to adjudicate its just and equitable interest in these lands.[6]

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[5] This question is a matter of great importance in the State of Oklahoma because several "former reservation areas" are shared by two or more tribes with various rights determined pursuant to the discretionary authority delegated to the Secretary. For example, the Wichita, Caddo and Delaware Tribes share a common reservation, see Agreement dated June 4, 1891, 28 Stat. 895; the Cheyenne and Arapaho Tribes share lands pursuant to Agreement dated April 12, 1892, 27 Stat. 1018; perhaps most illustrative, is the shared reservation of the Kiowa, Comanche, and Apache Tribes (see Agreement dated October 21, 1892, 31 Stat. 677), which is also inhabited by the Fort Sill Apache Tribe pursuant to Executive Order dated February 26, 1897. This question is as well akin to the dispute between the Navajo and Hopi Tribes – a century-old dispute involving conflicting Indian claims to the same land. *See Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

[6] The Tenth Circuit Panel ("Panel") and the District Court relied heavily on dicta contained in a decision of the Indian Claims Commission, i.e., *Citizen Band of Potawatomi Indians of Okla. v. United States*, 6 Ind. Cl. Comm. 658 (1958), in order to hold that the AST had been determined to be "squatters". By definition, the AST cannot be "squatters" where their occupancy predates by 30 years the occupancy of the Citizen

The Citizen Band initiated this case seeking an erroneous declaration that the former reservation area in question was exclusively the reservation of the Citizen Band and that the AST and the Secretary through the Anadarko Area Director were required to obtain the consent of the Citizen Band before taking land within the former reservation area in trust for the AST. The AST's position, consistent with the decision issued by the IBIA and the original decision issued by the Anadarko Area Director on behalf of the Secretary of the Interior on September 17, 1992, is that the material fact at issue in this case is whether, in the aftermath of the 1890 taking of the reservation by the United States, the AST has present day recognition of rights that accrued prior to the taking in the geographic area known as the "former reservation area" sufficient for the Secretary of the Interior, in his discretion, to place land in trust for the benefit of the AST without the consent of the Citizen Band. The AST and Citizen Band have consistently been recognized by the BIA and Congress to have co-extensive rights in the former reservation area negating any need for obtaining the Citizen Band's consent. This "equal-footing" determination for both tribes is a matter well within the discretion of the Secretary as is indicated in the controlling statute, 25 U.S.C. § 465, and regulations in 25 C.F.R. Part 151 and is supported by the legal and historical antecedents.

Authoritative decisions of the United States Supreme Court have recognized that tribal rights in land can be obtained by actual possession and occupancy without treaty, executive order or deed, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1942), and that two Indian tribes may have shared interests in *de jure* reservations. See *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937). The question

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Band. In any event, that language is not relevant to the holding of the ICC case that involved compensation for the Citizen Band and the case does not involve the AST. The AST was not a party to that case nor in privity with any party to that case; therefore, the pre-existing rights of the AST has not been litigated or determined in an adversary proceeding. Therefore, the AST cannot be bound by that decision or precluded from seeking a proper determination of its aboriginal claim to the subject lands.

presented here, whether two Indian tribes have shared interests in a "former reservation area" in Oklahoma has not previously been addressed by this Court.

Further, authoritative decisions of the United States Supreme Court have held that decisions of administrative agencies should receive deference when those decisions concern administrative interpretation of matters within their areas of expertise. This directive is particularly useful in the area of Federal Indian law where the facts, principles and historical relevance can prove to be complex and easily misconstrued. This case represents just such a case according to the Panel's own determination[7]; therefore, proper deference should have been afforded the IBIA decision.

The erroneous decision made by the Panel is in clear contravention of long-standing United States Supreme Court judicial precedents, federal statutory and regulatory authority, and other time-honored Federal Indian law principles.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S DECISION IS CONTRARY TO THE SUPREME COURT RULING IN *SHOSHONE TRIBE v. U.S.*

The Panel's ruling in this matter is in direct conflict with authoritative Supreme Court precedent, *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937). The Panel misconstrued the *Shoshone Tribe* decision and incorrectly distinguished it from the issues involved in the present case. Of utmost importance, the Panel

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[7] With reference to the language employed by Congress in the 1891 Act, the Panel stated that "[t]he language is at least as consistent with Congressional intent to receive a quit claim deed from the Absentee Shawnees as with an intent to recognize or create a legitimate claim of ownership rights." "Ambiguity" is defined as that language "reasonably capable of being understood in more than one sense". Black's Law Dictionary, p. 73 (5th Ed.) Therefore, the deference required by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) should have been afforded the administrative decision made by the IBIA.

misconstrued the AST's perfected right of occupancy, as recognized by Congress and the Executive Department, that predated the advent of the Citizen Band, in a tract of land that was ultimately surveyed and became known as the "Potawatomi Reservation", resulting in an incorrect application of *Shoshone Tribe* to the present case. *Shoshone Tribe* began as an action in the Court of Claims for money damages against the United States because it had settled another tribe, the Arapahoes, on the Wind River Reservation, which had been reserved exclusively for the Shoshones by treaty.

A. Factual Background and holding of *Shoshone Tribe v. U.S.*

The Wind River Reservation, established by treaty of July 3, 1868, 15 Stat. 672, was established to "set apart [land] for the absolute and undisturbed use and occupation of the Shoshonee Indians." In 1878, without the consent of the Shoshone Tribe, a band of Arapahoes was brought to the reservation by military escort and settled there. The Shoshone Tribe then complained that the presence of the Arapahoes interfered with the legal possession of the Shoshone Tribe. In spite of the Shoshone Tribe's complaints, the federal government thereafter treated the reservation as jointly owned by the two tribes. Congress, in 1897[8] and 1905[9], ratified agreements with both tribes, providing for cession of land and for allotments to tribal members of both tribes. Finally, after continued protests by the

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[8] The Supreme Court found that "[t]his agreement with its clear recognition of the occupancy of the Arapahoes and their equal interest in the land, was ratified by act of Congress." Act of June 7, 1897, 30 Stat. 62. *Shoshone* at 489.

[9] With respect to this Agreement, the Supreme Court states as follows: "Again, on April 21, 1904, the Government made an agreement with the two tribes for the cession of a large tract . . . . Again the Shoshones protected that the Arapahoes were intruders . . . . Again, the Government dealt with the two tribes as lawful occupants and equals. This agreement like the earlier one was ratified by act of Congress." Act of March 3, 1905, 33 Stat. 1016. *Shoshone* at 489.

Shoshone Tribe, a statute was passed by Congress to allow the Shoshone Tribe to sue in the Court of Claims for its claims arising out of the 1868 treaty. See Act of March 3, 1927, 44 Stat. 1349.

The Supreme Court ultimately determined that the Shoshone Tribe was the sole beneficial owner of the reservation area prior to 1878, but that the Shoshone Tribe was deprived of that ownership when the Arapahoes were placed there. The Shoshone Tribe was determined to be entitled to compensation for the taking of its interest in the reservation, and since that time, the United States has recognized the Shoshone Tribe and the Arapaho Tribe as sharing both the ownership of tribal lands and the right to govern the reservation.

In its effort to determine the intent of Congress in ratifying the taking, the Court found "most important of all, the statutes . . . recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." *Shoshone Tribe* at 495.

B. Factual background of AST's rights in the subject area and evidence that such rights are recognized by Congress and the Secretary

It is beyond cavil that the AST was in open and exclusive possession of the subject area as early as the 1840's – at least thirty years prior to the Citizen Band's arrival in the subject area.[10] This Court has recognized that the claims of a Tribe to land does not need to be based upon formal government action.

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[10] For a brief summary of the history of the AST, see Chapman at App. 125. For a more complete discussion of the history of the AST, see James H. Howard, Shawnee!: The ceremonialism of a native Indian tribe and its cultural background (1981). Both sources indicate that at least by 1840 various groups of the Shawnee Tribe had settled on the Canadian River in Oklahoma and later became known as the Absentee band of Shawnees, taking its name from a provision of the treaty of May 10, 1854, concluded with those Shawnees who remained in Kansas.

See United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1942) (stating "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action."). "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." *Id.* Valid tribal claims to land can exist by virtue of aboriginal title – or that interest which Indians possess in land based solely upon the rights acquired by them as the original inhabitants of the land, and not upon statute, treaty, or grant by or with the United States or any prior sovereign.[11] *Id.* "As stated in *Mitchel v. United States*, . . . Indian 'right of occupancy is considered as sacred as the fee simple of the whites.' " *Id.* at 345. Contrary to the erroneous holding of the Panel,[12] the United States Government, through the Secretary of the Interior, Commissioner of Indian Affairs, and others, recognized the AST's right of occupancy in the subject area as evidenced by the relevant correspondence, agency proceedings, and congressional enactments.

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[11] As federal policy, Indian right of occupancy was first recognized in *Johnson v. M'Intosh*, 8 Wheat. (US) 543 (1832) and has been repeatedly reaffirmed. *Worcester v. Georgia*, 6 Pet. (US) 515 (1832); *Mitchel v. United States*, 9 Pet. (US) 711 (1835); *Chouteau v. Molony*, 16 How. (US) 203 (1853); *Holden v. Joy*, 17 Wall. (US) 211 (1872); *Buttz v. Northern P.R. Co.*, 119 U.S. 55 (1886); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

[12] The Panel refused to recognize any preexisting right of occupancy for the AST and erroneously supported this careless position by reference to H.R. Rep. No. 51-3481 at 1 (1891) wherein the writer describes the Absentee Shawnees as being on the land without "any treaty or Executive order, but the Government has long known of their presence there." App. 19. This statement made long ago could not have "created" any rights for the AST – but surely it is a recognition of the AST's preexisting right of occupancy. Clearly, this recognition is exemplified by Congress' actions taken in ratifying the 1890 agreements with both tribes thereby confirming prior tribal title for both tribes and by the Secretary's subsequent treatment of both tribes on an "equal footing" basis.

On the face of the treaty with the Potawatomies dated February 27, 1867, 15 Stat. 531, App. 103 ("1867 treaty"), the Citizen Band was allowed to choose a tract of land in Indian country "without interfering with the locations made for other Indians" – an obvious recognition of the prior presence of the AST. Between 1868 and 1872, because of the prospect of the 1867 treaty, the land, and the citizenship of all Potawatomies,[13] both the Citizen Band and the AST became "uneasy in regard to their rights in and to lands within the reservation . . . " App. 142. In 1870, after many Potawatomies, now citizens, had disposed of their land and squandered their money, the Citizen Band requested "their agent to ask that the lands of the reservation be surveyed and paid for as stipulated in the treaty of 1867." App. 144. Because of their fear of encroachment by the Potawatomies, in February, 1872, the chiefs and councilmen of the AST[14] petitioned the President of the United States for permission to remain on the tract of land where they had homes and had made improvements and requested to be issued a title to said lands.[15] The petition indicated that the AST had "received nothing for the lands which the government had given them in Kansas", App. 143, and this request was made for a title to these lands in lieu of the Kansas lands. App. 143. Department of Interior officials recommended that the request of the AST be granted. App. 143. On March 15, 1872, the Secretary of the Interior, in a letter to the House of Representatives, declared the failure of the Potawatomi Reservation, stating as follows:

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[13] The events of this era surrounding the land, the Citizen Band and the AST are expertly outlined in Berlin B. Chapman, *The Pottawatomie and Absentee Shawnee Reservation*, Chronicles of Oklahoma, Vol. 24, Fall, 1946 at 293-305. A copy of this article is attached at App. 125-147 for the convenience of the Court.

[14] Clearly the AST had a fully functioning government at this time. This should effectively end any discussion that the AST were merely individual tribesmen that wandered onto this property.

[15] The petition is in OIA, Shawnee, H. 1247-1872. App. 143.

A careful examination of the treaties referred to in this communication [Treaties dated November 15, 1861, 12 Stat. 1192; March 29, 1866, 14 Stat. 763; and February 27, 1867, 15 Stat. 531] has brought my mind to the conclusion that they [the treaties] were intended to provide for all the Pottawatomies the rights of naturalization and citizenship; that it was not expected, however, that each and every one of said Pottawatomies would avail himself of this right, and that, in order to provide for those who did not become citizens, the Secretary of the Interior was authorized to set apart as a reservation for their exclusive use and occupancy, as a "*tribe*", a tract of land, not exceeding thirty miles square, in the Indian country, and that upon payment therefor "*a patent should issue to the Potawatomi Nation.*"

I am informed by the Commissioner of Indian Affairs that all the Pottawatomies have become citizens of the United States. It would, therefore, seem that there is now no Pottawatomie "*Nation*" in existence, nor any "*tribe*" of said nation, . . .

The expectations of the contracting parties, at the date of the treaty, have not been realized. The Pottawatomies are now all citizens; the nation is extinct, and no patent can be issued to the nation, as such, according to the text and unequivocal meaning of the treaty of 1867. A tract of land thirty miles square in the Indian country has been surveyed, and many of the Pottawatomies, now citizens, have removed to it and are now residing thereon. It has not been paid for because it has never been conveyed by patent, as contemplated by the treaty, and I am of opinion that, under existing circumstances, the Secretary of the Interior has no power to cause this tract to be conveyed to the Pottawatomies. It certainly cannot be conveyed "*to the nation*", because there is no nation. It cannot be conveyed to individual members of what was once the nation, nor to a trustee for the benefit of the nation for want of authority of law.

> In consequence of these difficulties it seems to me that there is necessity for further legislation . . .

House of Representatives, 42d Congress, 2d Session, Ex. Doc. No. 203, Letter from the Secretary of the Interior dated March 15, 1872, App. 104.

On March 30, 1872, the Commissioner "directed that the Absentee Shawnees be permitted to remain in undisturbed possession of their lands and improvements." App. 146. In April, 1872, the Commissioner noted that the "Absentee Shawnees were unprovided with any permanent home in the possession of which they could be protected by virtue of any compact or agreement" and that because of the failure of the Treaty of 1867 "there were on the thirty miles square tract west of the Seminole country, 2,263 Pottawatomies and Absentee Shawnees, without any authority of law for such residence, or any color of title to the soil." App. 146.

In obvious response to this situation, by Act of May 23, 1872, 17 Stat. 159, "provision was made whereby these Indians might acquire allotments on the said tract of land." App. 146 ("1872 Act"). Very few Citizen Band and no AST members were allotted under the 1872 Act. Congress thereafter enacted the General Allotment Act, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331 et seq. After being determined eligible by the Secretary of the Interior, and being given Presidential approval, allotments were made to both the Citizen Band and the AST under the General Allotment Act. Allotments to members of both the Citizen Band and the AST continued until 1891. See App. 106-120.

In 1891, pursuant to ratified agreements made in 1890 with both the Citizen Band and the AST under which allotment was completed, money compensation was made to the Citizen Band and the AST for relinquishing their respective claims to the subject area, and as a consequence, the reservation was dissolved. App. 121-124. By Act of March 3, 1891, 26 Stat. 989, App. 121-124 ("1891 Act"), all interests in the subject area of any kind of either tribe were relinquished to the United States – clearly an act of Congressional recognition of the respective rights in the subject area for both tribes.

C. The Panel attempts to incorrectly distinguish *Shoshone Tribe*

The Panel attempts to incorrectly distinguish *Shoshone Tribe* from the instant matter by relying on affirmative governmental action, i.e., the military escort provided for the Arapahoes, and the government's conduct from the outset indicating "a Congressional intent to recognize their [the Arapahoes] claim of rights in the reservation as of that time." App. 20-21. By its erroneous holding, the Panel gives no deference to Congress or the Secretary of the Interior and basically decides that the enactments of Congress and the decisions of the Secretary of the Interior relative to the AST and its rights in the subject area are vain and meaningless acts. Contrary to the Panel's holding, the record is replete with evidence of the clear Congressional intent to recognize the rights of the AST in the subject area pre- and post-1891. The Absentee Shawnee's perfected right of occupancy on the tract that predates any occupancy by the Citizen Band;[16] the February, 1872 petition for a grant of land and the Indian Agent's and the Superintendent's endorsement thereof; the May 23, 1872 Act providing for allotment of land within the tract to Absentee Shawnee; the application of the 1887 General Allotment Act to the Absentee Shawnees as Indians rightfully occupying a reservation area; and the 1890 agreement whereby the United States obtained identical cessions by the Absentee Shawnee and the Citizen Band of their respective interests in the tract, as well as subsequent treatment of the tract by the Secretary,[17] taken

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[16] The Panel begins its analysis from an erroneous assumption of "exclusivity" for the Citizen Band, App. 17, giving no consideration to pre-existing occupancy rights of the AST. Federal policy is to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty. *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, *reh'g denied*, 314 U.S. 716 (1942).

[17] Since 1891, Congress has enacted legislation dealing with the subject reservation on at least three occasions. App. 82-83. In the Act of September 13, 1960, 74 Stat. 903; the Act of August 11, 1964, 78 Stat. 292; and the Acts of January 2, 1975, P. L. 93-590 and 93-591, 88 Stat. 1922, the

together, provide justification for the Secretary to exercise his discretionary authority and treat the area as a common former reservation area shared by the two tribes for purposes of land acquisitions. The Panel's attempt to distinguish *Shoshone Tribe* and ignore clear congressional intent, as well as consistent actions by the Secretary, is contrary to law and violates established Supreme Court precedent.

D. Application of *Shoshone Tribe* to the present case

In *Shoshone Tribe*, the Court found "most important of all, the statutes . . . recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." 299 U.S. at 495. Contrary to the Panel's statement regarding the lack of governmental recognition of the AST's rights,'[8] the instant case is replete with instances of governmental recognition of the AST's rights in the subject area – strikingly similar to those elements of recognition found in *Shoshone Tribe*.

In *Shoshone Tribe* the Court analyzed the 1897 agreement reached with the Shoshone Tribe and the Arapahoes whereby both tribes ceded to the Government lands of the reservation. "This agreement with its clear recognition of the occupancy of the Arapahoes and their equal interest in the land, was ratified by act of Congress." 299 U.S. at 490. The Court also analyzed a ratified 1905 agreement with both tribes and found that "[m]any . . . provisions of the agreement and the statute are almost equally explicit and significant in their recognition of the status quo." *Id.* Identical to the analysis of *Shoshone Tribe*,

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"Congress acted consistently with the 1891 Act, recognizing both tribes as having rights in the reservation." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169, 186 (1995), App. 83-84.

[18] The Panel stated that the "affirmative acts by the government that the Court found compelling in *Shoshone Tribe* are the very factors missing in the instant case." App. 20.

the ratified 1891 agreements reached with the Citizen Band and the AST whereby both tribes ceded to the Government lands within the reservation, indicates that Congress deemed that the AST and the Citizen Band have interests in the subject area – a clear recognition of the aboriginal right of occupancy of the Absentee Shawnee and their recognized interest in the land.[19] A brief analysis of the wording of the agreement and the legislative history will bear out these statements.

In Section 9 of the 1891 Act, App. 122, the AST ceded to the United States "all their claim, title and interest of every kind and character in and to" the subject lands. Article II confirmed the allotments made to the AST's members under the General Allotment Act.[20] Perhaps most importantly,

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[19] The Panel points out that the Indian Claims Commission case relative to the Pottawatomies, *Citizen Band of Potawatomi Indians of Okla. v. United States*, Docket No. 96, 6 Ind. Cl. Comm. 658 (1958), rejected the argument that the reservation had failed for lack of consideration holding that "the government's failure, if any, to pay over these funds as consideration for the purchase of the reservation at issue could not be charged to the Tribe." App. 7. In reality, the ICC "made no finding as to whether or not the Indians paid the Government for the land involved" because it was unnecessary to reach that issue in order to decide the stipulated issues in that case. *Id.* at 661-62. The ICC holding leaves open an issue of material fact relevant to this case and, in any event, the ICC case cannot be res judicata against the Absentee Shawnee Tribe as the AST was not a party in that case and was not in privity with any party to that case. The IBIA correctly decided that "[t]he Indian Claims Commission's decision in Docket 96 is binding on the Board as to the fact of a taking from the Citizen Band and as to the date of taking. While it is clearly relevant to this case, that decision does not dictate the resolution of the issue here." 28 IBIA 179, App. 72.

[20] In its analysis of this matter, the IBIA states at 28 IBIA 182, fn. 18, App. 77, as follows:

> By authorizing allotments to Absentee Shawnees under the General Allotment Act, the Secretary of the Interior and the President had recognized some rights in the Absentee Shawnees to lands in the Potawatomi Reservation, because the General Allotment Act clearly contemplated that allotments

Section 9, Article IV, provided for compensation to Absentee Shawnees as follows:

> It is further agreed, as a further and only additional consideration for such relinquishment of all title, claim and interest of every kind and character, in and to such lands, the United States will pay to said Absentee Shawnees in said tract of country . . . the sum of sixty-five thousand ($65,000) dollars for making homes and other improvements on their said allotments.

The legislative history of this agreement and subsequent congressional act clearly reveal that Congress, by its actions, intended to recognize rights in the lands for the AST. In H.R. Rep. No. 3481, 51st Cong., 2d Sess. 1 (1891), it is clearly stated as follows:

> The bill provides for the ratification of two agreements entered into on behalf of the United States by the Cherokee Commissioners, the first on the 25th day of June, 1890, with the Citizen Band of Potawatomi Indians; and the second on the 26th day of June with the Absentee Shawnee Indians, all residing on the Potawatomi Reservation, in Oklahoma Territory, *for the relinquishment of their respective rights upon and to said reservation.* (Emphasis added.)

Here, as in *Shoshone Tribe*, two tribes occupied the same reservation area. In both cases, Congress accepted a deed of cession from both tribes and compensated both tribes for the cession. In *Shoshone Tribe* both tribes were found to have rights in the reservation and are treated equally by the courts and the government to this day. In the instant case, because of the erroneous decision by the Panel, the AST, after being treated equally with the Pottawatomies by the Government for

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within a reservation would be made to members of the tribes for whom the reservations had been created. . . . To the extent the Secretary and the President might have erred in their legal conclusion, however, Congress cured the error by confirming the allotments.

more than one hundred years with respect to this area, must now be treated as having a lesser interest, or worse, no interest at all in lands that the AST has inhabited for more than 150 years.

The erroneous decision of the Panel to recognize the Citizen Band as having an interest in the land in question superior to the interest of the AST is an extreme example of the injustice that can occur when a Court attempts to construe historical facts and legal import in an area of expertise for which it is unprepared and possesses no expertise. The case at bar is a textbook example of why Courts are required to give deference to agency decisions that construe statutes and regulations Congress has entrusted to the agency for administration.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S DECISION IS CONTRARY TO THE LANGUAGE OF 25 U.S.C. § 465, 25 C.F.R. §§ 151.2(f) AND 151.8 AND THE DISCRETIONARY AUTHORITY PROVIDED THEREIN

25 U.S.C. § 465 provides discretionary authority for the Secretary of the Interior to acquire lands for the benefit of Indians. This discretionary authority is carried over to the regulations promulgated thereunder by allowing the Secretary of the Interior to define "Indian Reservation" for purposes of placing land in trust in Oklahoma. See 25 C.F.R. §§ 151.2(f) and 151.8. In an obvious effort to accommodate the unique circumstances surrounding Indian reservations in Oklahoma, no definition exists in the cited statutes or regulations for the term "former reservation" – rather, the Secretary of the Interior retains discretionary authority to define what constitutes a "former reservation" taking into account the unique facts and circumstances for each "former reservation" in Oklahoma.

25 C.F.R. § 151.2(f) is a legislative recognition of the extraordinary circumstances surrounding reservation status in Oklahoma pre- and post-1890. In Felix Cohen's Handbook of Federal Indian Law, the writer indicates that each statute or agreement should be examined individually to determine the existence or nonexistence of reservation status in Oklahoma. F. Cohen, Handbook of Federal Indian Law 775-76 (1972). See

also, Pipestem, *The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 Am. Indian L. Rev. 1, 6-7 (1978). It is clear and logical that the complexity of the issues surrounding the existence or nonexistence of reservation status in Oklahoma pre- and post-1890 was one of the reasons that Congress, in its wisdom, granted discretionary authority to the Secretary to determine former reservation areas for Indian tribes in Oklahoma.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL FAILED TO GIVE PROPER DEFERENCE TO THE SECRETARY OF THE INTERIOR'S AGENCY DECISION AS REQUIRED BY SUPREME COURT PRECEDENT

The United States Supreme Court has recognized the need for judicial deference to agency decisions in matters charged to its regulatory authority. See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The need for this deference is based upon the agency's clear expertise in the particular field.

Agency action will not be set aside by the Court "unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. In *Chevron*, the Court outlined the two questions to be addressed when a court reviews an agency's construction of a statute which it administers.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the questions for the court is whether

> the agency's answer is based on a permissible construction of the statute.[21]

Chevron at 842-43. The statute at issue here, 25 U.S.C. § 465, gives broad discretion to the Secretary of the Interior to acquire land, within or without existing reservations, for the benefit of Indians. The sections of the Code of Federal Regulations promulgated thereunder, 25 C.F.R. Part 151 et seq.,[22] as well, allows broad discretion for the Secretary to define the term "Indian Reservation" in Oklahoma. Specifically, 25 C.F.R. § 151.2(f) provides that in Oklahoma, "Indian Reservation" means "that area of land constituting the former reservation of the tribe *as defined by the Secretary*." The broad discretionary authority granted to the Secretary clouds any clear Congressional intent that could be gleaned from these provisions as to the meaning of the term "Indian Reservation" within the State of Oklahoma for these purposes. The provision is, by definition, ambiguous. Therefore, pursuant to *Chevron*, *supra*, the standard of review for the Panel to employ is whether the agency's decision is based on a permissible construction of the statute – not whether the agency's interpretation is contrary to law as utilized by the District Court or engaging in fresh analysis of legislative intent in passing the 1891 Act as the Panel did.

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[21] "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron* at 842-43, n. 9.

[22] "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron* at 843 (citing *Morton v. Ruiz*, 415 U.S. 199 (1974)). Where the delegation to the agency is implicit rather than explicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of any agency." *Id.*

A. Deference must be afforded the IBIA decision

The Panel's review of an agency's action is "narrow and substantial deference is afforded to the actions of administrative agencies in compliance with their statutory enforcement obligations." *Santa Fe Energy Products Co. v. McCutcheon*, 90 F.3d 409, 413 (10th Cir. 1996); *Phillips Petroleum Co. v. Lujan*, 951 F.2d 257, 259 (10th Cir. 1991). Although its "inquiry must be 'careful and searching,' [the court] must uphold the agency if there is a rational basis for its opinion. 'All the agency need do is demonstrate it considered relevant factors and alternatives after a full ventilation of the issues, and that the choice it made was reasonable based on those considerations.' " *National Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1532 (10th Cir. 1993) (quoting *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 643 (10th Cir. 1990)). So long as there exists a rational basis for the agency's decision, a reviewing court is without authority to overturn agency action as arbitrary or capricious. *Dawson v. Andrus*, 612 F.2d 1280 (10th Cir. 1980); *Colorado River Water, et al. v. United States*, 593 F.2d 907 (10th Cir. 1979).

In *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that it had:

> long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decisions as to the meaning and reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than the ordinary knowledge respecting the matters subjected to agency regulations. [citation omitted]
>
> * * *
>
> If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative

> history that the accommodation is not one that Congress would have sanctioned.

467 U.S. at 844-45 (footnote omitted).

Deference to an agency's interpretation of its own statutes and regulations "is based upon the agency's greater expertise in the area they regulate. . . . When the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required." *Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n.*, 578 F.2d 289, 292-93 (10th Cir. 1978). When reviewing an agency's interpretations of the statutes it is entrusted to enforce, the federal courts have consistently held it:

> commonplace in our jurisprudence that an administrative agency's *consistent, long-standing* interpretation of the statute under which it operates is entitled to considerable weight. [citations omitted] This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.

International Bhd. of Teamsters, Warehousemen & Helpers of Am. v. Daniel, 439 U.S. 551, 556 (1979) (emphasis added).

The Department of the Interior has been involved in Indian affairs since its creation on March 3, 1849, when Congress directed that the "Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department in relation to all the acts of the Commissioner of Indian Affairs. . . . " F. Cohen, Handbook of Federal Indian Law 119 (1982) (hereinafter "Cohen") (citing the Act of March 3, 1849, 9 Stat. 395). Complete administrative responsibility over Indian affairs was vested in the Department of the Interior by the Act of July 27, 1868, 15 Stat. 228, which transferred to the Secretary of the Interior all "supervisory and appellate powers and duties in regard to Indian affairs which may now by law be vested in the said Secretary of the Treasury." Cohen at 120-21. To summarize, the Department of the Interior through the BIA and the

IBIA has been intimately involved in and responsible for interpreting and carrying out congressional directives regarding Indian affairs and policy for over 150 years. Accordingly, the Department's interpretations and conclusions regarding federal Indian law and policy are entitled to, and have received, great deference. *Udall v. Tallman*, 380 U.S. 1, *reh'g denied*, 380 U.S. 989 (1965).

Contrary to the above-cited established precedent, the Panel refuses to follow the IBIA's decision in this case and in fact, refuses to decide the deference issue totally choosing instead to construe anew the legislative intent in passing the 1891 Act – an issue already analyzed and decided by the IBIA. The Panel avoided the issue by stating that "upon applying traditional principles of statutory construction regarding treaty abrogation, we conclude that the IBIA's interpretation is clearly contrary to Congressional intent and thus not entitled to *Chevron* deference in any event." App. 16. The Panel misconstrues the facts and the law and loses sight of its role and what is at issue.

Clearly, at the core of this matter is the Secretary's regulation codified at 25 C.F.R. § 151.2(f). This regulation is promulgated, published and properly interpreted by the Secretary as a delegation of authority for the Secretary to define the area of land which constitutes the former reservation area of the tribe in Oklahoma. 25 C.F.R. § 151.2(f). Here, the Secretary properly defined the former reservation area of the AST and the Citizen Band consistent with previous holdings of the Secretary spanning over 120 years.

The entire basis for the Panel's opinion is that the decision of the agency is entitled to no deference because it is contrary to Congressional intent regarding treaty abrogation. In truth, it is the Panel's interpretation that is contrary to Congressional intent regarding treaty abrogation and addresses an issue that was not raised or briefed by any party. There can be no clearer intent to abrogate treaty rights than the language of the 1891 Act wherein the AST and the Citizen Band agree to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country in

the Indian Territory . . . " Applying traditional tools of statutory construction regarding treaty abrogation, it is clear Congress intended the 1891 Act to terminate all rights in the reservation area, if any, and recognize the pre-existing occupancy rights of the AST and the equitable rights of the Citizen Band in the now "former reservation".

The Panel ignores its charge to give deference to the administrative decision – a decision that is well-reasoned legally and grounded in the facts. Instead, the Panel chose to go beyond the IBIA's decision substituting its own determinations for the IBIA's where such legal conclusions are legally and factually unsupported as well as prohibited by binding judicial precedent.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE SUMMARY JUDGMENT FOR THE RESPONDENT IS TOTALLY INAPPROPRIATE

In the trial court, Plaintiff (now Respondent) filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure which provides that where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment may be granted. The proper consideration for the Court in a Motion for Summary Judgment is not whether the Plaintiff will ultimately be able to bear the proof burdens, but rather the Court simply tests whether genuine issues of material fact remain for trial. A "genuine issue" exists if there is evidence before the court upon which a jury could reasonably find in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986). Whether a fact is "material" hinges on the substantive law at issue. A fact is "material" if it might affect the outcome of the case. *Id.*

In the trial court, the entirety of Plaintiff's argument in support of his Motion for Summary Judgment surrounded the

issues of res judicata[23] and collateral estoppel[24] with regard to a prior decision issued by the Indian Claims Commission, i.e., *Citizen Band of Potawatomi Indians of Okla. v. United States*, 6 Ind. Cl. Comm. 658 (1958). The Citizen Band contended that res judicata and collateral estoppel principles determined the material fact at issue in this case – whether post-1890 the Citizen Band has exclusive rights in the former reservation area to the exclusion of the Absentee Shawnee. The Citizen Band argued that the United States could take no position other than in favor of exclusive Citizen Band rights and that, in essence, these two well-settled doctrines prevented the defendants from asserting any defense contrary to that notion.

The doctrine of res judicata operates to bar a subsequent claim on the same cause of action once a valid judgment has been rendered on the merits of the first claim. It does not bar a suit on a different cause of action or involving different parties. Collateral estoppel, also known as "issue preclusion", is a more narrow consideration. The doctrine of collateral estoppel does not act as a complete bar unless the issues concluded by its operation are determinative of the matter in controversy in the second suit.

A. The Panel's decision misconstrues the res judicata effect of the ICC decision

Unlike the AST, the Citizen Band was a party to the ICC litigation, *Citizen Band of Potawatomi Indians of Okla. v. United States*, 6 Ind. Cl. Comm. 658 (1958) and is therefore bound by the decision entered therein. The ICC opinion as it relates to the existence or non-existence of a reservation

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[23] "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 429 U.S. 322 (1979).

[24] "Under the doctrine of collateral estoppel . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 429 U.S. 322 (1979).

pre-1891, can have no binding effect on the AST.[25] The AST was not a party to the ICC litigation or in privity with any party in the litigation and therefore cannot be bound by the decision therein. *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) (the general consensus is that one is not bound by a judgment in litigation to which he is not a party nor in privity with a party). On the other hand, the ICC decision provided monetary compensation to the Citizen Band for land taken by the United States over and above that allotted to its members. In contravention of statutory authority,[26] the Citizen Band is now seeking a second determination of exclusive control over certain lands for which it was previously compensated. 25 U.S.C. § 70u (1983) existed to prohibit just such action and has been judicially construed as follows:

> There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient

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[25] The Panel states that "[t]he Absentee Shawnee Tribe does not challenge on appeal the IBIA determination that it is bound by the ICC's holding that the Potawatomi Tribe had exclusive ownership of the reservation as of June 25, 1890." App. 14. The IBIA actually held that "[t]he Indian Claims Commission's decision in Docket 96 is binding on the Board as to the fact of a taking from the Citizen Band and as to the date of taking. While it is clearly relevant to this case, that decision does not dictate the resolution of the issue here." 28 IBIA 179, App. 72. Further, the decision of the IBIA was rendered prior to the AST intervening in this case. Therefore, the AST was not a party that could appeal the IBIA decision in the administrative arena. It is legal myopia to contend that the AST does not challenge the exclusive ownership issue when clearly the AST has consistently argued that the AST had pre-existing rights in the subject area that pre-dated the presence of the Citizen Band. Further, the Panel incorrectly states that "the Absentee Shawnee Tribe has maintained throughout this appeal that the issue is whether the Tribe had recognized rights in the Potawatomi reservation arising *after* June 25, 1890." To clarify, the AST's position is that the operative words are "former reservation" which area did not exist as a former reservation until after June 25, 1890. The rights of the AST arose prior to that date and were confirmed by the 1891 Agreement in accordance with *Shoshone Tribe*.

[26] 25 U.S.C. § 70u.

> wrongs, respecting Indians, and to have them adjudicated once and for all. It may have even been so optimistic as to hope to have this accomplished in the lifetimes of persons then living. It provided in Section 22 that *payment of a claim as assessed under the Act would discharge not only the specific claim made, but all claims and demands touching any of the matters involved in the controversy.* (Emphasis added.)

Temoak Band of Western Shoshone Indians v. United States, 593 F.2d 994, 998 (Ct. Cl. 1979). Such actions requesting multiple relief for a single controversy are explicitly prohibited. 25 U.S.C. § 70u ("The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.")

Critical analysis of § 70u and the common law principles of these doctrines reveal that the bar provided in § 70u of the Indian Claims Commission Act runs against the Citizen Band instead of the AST. In the ICC case, the Citizen Band established a compensable right for a taking of the reservation including that interest taken for the AST and adequately proved that the United States purchased ceded lands from the Citizen Band for consideration that was unconscionable. 14 Ind. Cl. Comm. 585, 607 (December 30, 1964). On August 27, 1968, the ICC determined that the Citizen Band was entitled to recover $797,508.99 for the taking. 19 Ind. Cl. Comm. 368, 384 (1968). The funds to pay this award were appropriated by the Act of July 22, 1969, 83 Stat. 49, 62, and use of the funds was authorized by the Act of Sept. 16, 1970, 84 Stat. 838. As a result of this compensation, the Indian Claims Commission Act ("ICCA") at § 70u prevents the Citizen Band from pursuing any further claim against the United States related to any of the matters involved in that controversy. *See United States v. Dann*, 470 U.S. 39 (1985) (for purposes of 25 U.S.C. § 70u, payment was made when the Western Shoshone award was appropriated and placed in a Treasury account, even though the award was never paid out, which barred any subsequent lawsuit by the plaintiff against the United States pursuant to 25 U.S.C. § 70u).

The Western Shoshone decision is the first clear recognition that ICC decisions have preclusive effect pursuant to the res judicata-like merger and claim preclusion provisions of 25 U.S.C. § 70u. Yet, incredibly, in the instant case, in blatant disregard of the prior ICC decision and the bar to further action contained in § 70u of the ICCA, the Citizen Band brought yet another claim of exclusivity against the United States relating to the same subject area and the same controversy previously decided. Citizen Band's action is clearly barred by the res judicata/claim preclusion provisions of the ICCA.

Ironically, the trial court held that although the Defendants in the case, the United States and the Absentee Shawnee Tribe, are precluded from litigating issues surrounding the existence and ownership of the former Potawatomi Reservation area, the Citizen Band is not. The Panel very craftily avoided the issue of res judicata and stated that "we need not address whether the ICC had jurisdiction to determine the ownership of the reservation, or whether its opinion is binding on the government and/or the Tribe.[27] App. 14. If res judicata or collateral estoppel applies at all, it runs against the Citizen Band Potawatomi Indian Tribe of Oklahoma – plaintiff in the ICC case and plaintiff here pursuing the same exclusivity claim. The Panel totally misconstrued § 70u and the res judicata effect of that statute.

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[27] Although the Panel avoided the res judicata issue relative to the government or the AST, the Panel incorrectly held that res judicata does not run against the Citizen Band because it is not seeking additional compensation. If payment of money as ordered by the Indian Claims Commission is the trigger for res judicata effect, res judicata, again, cannot run against the AST as no claim was ever made to the Indian Claims Commission for compensation on its behalf. However, § 70u does not require the payment of money as the trigger for res judicata, but rather the bar is triggered by a second demand against the United States – such as here.

CONCLUSION

The Panel decision incorrectly affirmed an erroneous grant of summary judgment and, though nominally focused on events post-1891, clearly goes behind the 1891 Act in order to declare the AST's perfected right of occupancy to the subject lands nonexistent and hold that the treaty rights of the Citizen Band miraculously survived express abrogation by Congress. In so doing, the Panel overlooks or chooses to ignore essential facts in dispute that would preclude the affirmation of the grant of summary judgment in this matter. Petitioner AST respectfully requests that its request for a Writ of Certiorari to the Tenth Circuit Court of Appeals in this matter be granted.

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CITIZEN BAND **POTAWATOMI** INDIAN TRIBE OF OKLAHOMA, Plaintiff-Appellee,

v.

L.W. **COLLIER**, in his official capacity as the area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, Defendant, and Absentee Shawnee Tribe of Oklahoma, Defendant-Appellant.

No. 96-6219.

United States Court of Appeals,
Tenth Circuit.
May 5, 1998.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-92-2161-R)

F. Browning Pipestem (Dena L. Silliman, with him on the briefs), F. Browning Pipestem & Associates, Norman, OK, for Defendant-Appellant.

Michael Minnis (David McCullough, with him on the brief), Michael Minnis & Associates, P.C., Oklahoma City, OK, for Plaintiff-Appellee.

Before SEYMOUR, Chief Judge, LOGAN, Senior Circuit Judge, and MURPHY, Circuit Judge.

SEYMOUR, Chief Judge.

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Potawatomi Tribe) brought this action against L.W. Collier, an area director for the Bureau of Indian Affairs (BIA), seeking a declaration that the BIA is required to obtain the Tribe's consent before placing into trust land within the boundaries of the former Potawatomi reservation. The lawsuit was precipitated when the Absentee

Shawnee Tribe of Oklahoma (Absentee Shawnee Tribe) applied to the BIA to place such land in trust and the BIA informed the Potawatomi Tribe that its consent was not required under the relevant statute and regulations. In a thorough and well-reasoned opinion, the district court granted the Potawatomi Tribe's motion for summary judgment, holding that a prior ruling on the matter by the Interior Board of Indian Appeals (IBIA) for the Absentee Shawnee Tribe was contrary to law. The Absentee Shawnee Tribe, an intervenor below, appeals and we affirm.[1]

I

The governing statute provides in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. The regulations governing the acquisition of trust land under the above statute provide as follows:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of

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[1] The government filed an appeal which was subsequently dismissed on the government's motion before appellate briefing.

> land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma . . . , *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2(f) (1997). The regulations further provide:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

Id. § 151.8.

In the district court, the BIA asserted that the Potawatomi Tribe's consent was not required under section 151.8 because it shared the former reservation with the Absentee Shawnee Tribe. On appeal, the Absentee Shawnee Tribe likewise contends that section 151.8 does not apply because it has historically shared the reservation with the Potawatomi Tribe, and that the reservation should therefore be considered that of the Absentee Shawnee as well as that of the Potawatomi. This appeal therefore requires an assessment of the status of the land that comprises the former reservation vis-a-vis the two tribes, as revealed by the relevant treaty, statutes, and prior proceedings. We begin our review with a description of the legal history of the land at issue.

The land initially gained reservation status in 1867 pursuant to a treaty between the United States and the Potawatomi Tribe. The treaty recites that its purpose was to secure a home for the Tribe, which was being removed from the state of Kansas to what was to become the state of Oklahoma. *See* Treaty with the Potawatomi, Feb. 27, 1867, 15 Stat. 531. The Tribe and a government commission were to visit the area to select a suitable location, "and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe." *Id.* art. 1. It nonetheless appears undisputed that individual Absentee Shawnees, who had separated from the Shawnee Nation, had already settled on a portion of the tract selected as the Potawatomi reservation. The Absentee Shawnees petitioned the President to grant them title to the land on which they had settled. Although the Potawatomi Tribe agreed not to disturb the Absentee Shawnees, it in turn requested that the Potawatomi reservation be extended westward to include an area equivalent to that occupied by the Absentee Shawnees.[2]

Apparently in response to this situation, an Act was passed in 1872 authorizing the allotment of land within the Potawatomi reservation to each member of the

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[2] These background facts are taken from a decision of the Indian Claims Commission, *The Citizen Band of Potawatomi Indians of Okla. v. United States*, 6 I.C.C. 646 (Sept. 18, 1958), which we discuss infra. The findings were recited by the IBIA in its ruling and are essentially undisputed.

Potawatomi Tribe, and to those Absentee Shawnee Indians who had been residing therein. *See* Act of May 23, 1872, ch. 206, 17 Stat. 159. The Act provided that "allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, . . . shall be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band," and further stated that "they may enforce the laws and usages heretofore enforced among them as an Indian tribe, . . . and shall be entitled to equitable representation in the general territorial council, and subject to general laws which it may legally enact." *Id.* § 1, at 159-60. The Act also provided for allotments to "any Indian of pure or mixed blood of the Absentee Shawnees," who was either a head of a family or over twenty-one years of age, had resided continuously within the reservation for three years, and had made substantial improvements to the land. *Id.* § 2, at 160. No Absentee Shawnee Indians and only a handful of Potawatomi Tribe members received allotments under the 1872 Act, although both Absentee Shawnees and Potawatomi Tribe members continued to reside on the reservation. The Potawatomi Tribe has continuously maintained that the land was reserved to the Tribe under the 1867 Treaty and that the Absentee Shawnees were there only with the Tribe's permission.

In 1887, Congress passed the General Allotment Act, 25 U.S.C. § 331. The Secretary of the Interior determined that the Act applied to the reservation and authorized allotments of land within the reservation to both Potawatomi Tribe members and Absentee Shawnees. Allotments were thereafter made to members of both groups.

The government entered into an agreement with the Potawatomi Tribe on June 25, 1890, and with the Absentee Shawnees the next day, under which the reservation was ceded to the government. In 1891, an Act was passed setting out those agreements. *See* Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1016-22. The Act provided that the Potawatomi Tribe "hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" the Potawatomi reservation. *Id.* § 8, Art. I, at 1016. As consideration for the relinquishment, the Act further provided that the "United States will pay to said Citizen Band of Pottawatomie Indians" $160,000. *Id.* § 8, Art. IV, at 1018. With respect to the Absentee Shawnee Indians, the Act embodied the agreement entered into between "Commissioners on the part of the United States and the Absentee Shawnees residing on what is commonly known as the Pottawatomie Reservation." *Id.* § 9, at 1019. The Act provided that the Absentee Shawnees likewise relinquished their claim to any interest in the reservation, *id.* § 9, Art. I, at 1019, and agreed to provide as consideration the payment of $65,000 to be distributed per capita to allottee Absentee Shawnees on the reservation for their homes and other improvements on their allotments, *id.* § 9, Art. IV, at 1020-21. Finally, the Act conferred jurisdiction upon the Court of Claims to hear and determine all claims the Potawatomi Tribe might have against the United States arising from the preceding events. *Id.* § 12, at 1021. There was no similar provision for the Absentee Shawnees.

Years later, the Potawatomi Tribe filed a claim against the United States with the Indian Claims Commission

(ICC) to recover additional compensation for the surplus lands in the former reservation, that is, those lands left in the reservation after allotments had been made to the individual members of the Potawatomi Tribe. The government contended that the Tribe was not entitled to compensation for that portion of the reservation occupied by the Absentee Shawnees because the Tribe had consented and agreed that the Absentee Shawnees could remain on the land.[3] The ICC rejected this contention as unsupported.

> We do not find any evidence in the record of any consent or waiver on the part of the Citizen Band to a tract of land containing less than 900 square miles. That the Citizen Band did not waive its claim of ownership of the lands occupied by the Shawnee is evidenced by the Band's willingness to have their west boundary extended sufficiently to add an equivalent area of land to that occupied by the Shawnees within the 900 square mile tract that had been approved for the Citizen Band by the Government, if the Government desired to let the

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[3] The government also defended on the ground that a patent to the reservation was never issued to the Potawatomi Tribe because the Tribe never paid the agreed consideration and therefore had no compensable interest in the reservation. The ICC rejected this argument, holding that the United States received the proceeds from the Tribe's sale of its lands in Kansas before the move pursuant to the 1867 Treaty, and that the government had held these funds in trust for the Tribe. The ICC held that the government's failure, if any, to pay over these funds as consideration for the purchase of the reservation at issue could not be charged to the Tribe. *See The Citizen Band of Potawatomi Indians of Okla.*, 6 I.C.C. at 661-63.

Shawnee remain permanently on the Oklahoma Reservation tract. (Finding 9).

It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not "locations made for them" by the Government. They were, as defendant [the government] states, "in the nature of squatters" (Def.Br. p. 9) whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive [executive] branch of the Government or by the Citizen Band. (Finding 8)

The agreement of June 26, 1890, (26 Stat. 1019) wherein the Absentee Shawnees ceded the entire Oklahoma Reservation for a consideration of $65,000 and confirmation of their allotments cannot be construed as a ratification of a "reservation title" or of a use and occupancy title from time immemorial. Their possessory right was in the nature of a tenancy at will; they were in "peaceable possession" after the arrival of the Citizen Band only because the Citizen Band expressed a willingness not to disturb them provided the Government extended the Citizen Band's reservation to include an equivalent area westward. (Finding 8)

The Citizen Band of Potawatomi Indians of Okla. v. United States, 6 I.C.C. 646, 663-65 (Sept. 18, 1958).

II

In 1992, the Potawatomi Tribe received information leading it to believe that the Absentee Shawnee Tribe had

applied to the BIA to take into trust lands lying within the former Potawatomi reservation. Accordingly, the Potawatomi Tribe asked the BIA if any such applications were pending. In a letter to the Tribe dated September 17, 1992, Mr. Collier, for the BIA, refused to confirm or deny the existence of Absentee Shawnee applications. Nonetheless, and notwithstanding the ICC opinion quoted above, Mr. Collier set out the BIA's view that the two Tribes shared a common former reservation area and that the consent of the Potawatomi Tribe was therefore not a necessary predicate to placing that land into trust status under the statute and regulations set out in Part I supra. In support of the BIA's position Mr. Collier relied on the 1872 Allotment Act which, as discussed above, authorized the allotment both to members of the Potawatomi Tribe and to Absentee Shawnees of "land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians." 17 Stat. at 159.

The Potawatomi Tribe filed suit in federal district court, seeking to prevent the BIA from placing into trust lands lying within the former Potawatomie reservation. The government filed a motion to dismiss for failure to join the Absentee Shawnee Tribe as an indispensable party and for failure to exhaust administrative remedies. The district court ruled that the Absentee Shawnee Tribe was an indispensable party and dismissed the action on that ground. The Potawatomi Tribe appealed and this court reversed. *See Citizen Band Potawatomi Indian Tribe of Okla. v. Collier,* 17 F.3d 1292 (10th Cir.1994). We held that, standing alone, Mr. Collier's September 17 letter stating the BIA's position on the matter was insufficient to satisfy the BIA's burden of demonstrating the Absentee Shawnee

Tribe's interest in the former reservation. *Id.* at 1293-94. We also rejected as "irrelevant" the 1872 Act upon which the BIA relied, pointing out the Act

> does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. § 151.8. It merely grants the Secretary of the Interior the power to allot land to *individual* Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a *tribe*.

Id. at 1294.

On remand, the government renewed its motion to dismiss for failure to exhaust administrative remedies, and the district court directed the Potawatomi Tribe to pursue administrative relief, if available. Upon instructions from the BIA, the Tribe appealed Mr. Collier's position letter to the IBIA, which issued an opinion affirming Mr. Collier's decision. *See Citizen Band Potawatomi Indian Tribe of Okla. v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169 (Sept. 12, 1995). The IBIA held that it was bound by the ICC's decision that the Potawatomi Tribe owned the entire reservation as of June 25, 1890. The IBIA concluded, however, that because the ICC opinion determined the ownership of the reservation lands only as of that date, the ICC opinion was not determinative of rights in the land arising thereafter. The IBIA supported its conclusion by referring to *Shoshone Tribe of Indians of the Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937), which the IBIA described as bearing a resemblance to the history of the Potawatomi reservation. The IBIA also

concluded that this court's ruling in the first appeal did not preclude consideration of the merits because we had considered only whether the Absentee Shawnee Tribe was an indispensable party. The IBIA then determined that the language and the legislative history of the 1891 Act, when considered together with *Shoshone Tribe*, "support a conclusion that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation." 28 IBIA at 183.

The Potawatomi Tribe filed an amended complaint in district court alleging that the IBIA decision was entitled to no deference because it was contrary to law, and was arbitrary, capricious, and an abuse of discretion in any event. The Tribe accordingly renewed its motion for summary judgment on those grounds. The BIA filed a cross-motion for summary judgment, and the Absentee Shawnee Tribe was allowed to intervene.

The district court granted summary judgment for the Potawatomi Tribe. The court agreed with the IBIA that the ICC decision determined ownership rights only as of June 25, 1890 and held that defendant Mr. Collier was thus precluded from asserting that the Absentee Shawnee Tribe had an interest in the reservation prior to that time. Rejecting the government's argument that the ICC did not have jurisdiction to decide the matter, the court pointed out that the issue of ownership as of June 25, 1890, had already been litigated in the ICC proceeding where the government argued that the Absentee Shawnees had an ownership interest in the reservation to avoid paying compensation to the Potawatomi Tribe for at least that portion of the reservation occupied by the Absentee Shawnees. The resolution of the issue was

therefore necessary to the judgment rendered by the ICC. The court further ruled that, because the United States was a fiduciary or trustee for the Absentee Shawnee Tribe, the Tribe was in privity with and represented by the government in the ICC proceedings, and is likewise bound by that decision and precluded from relitigating its ownership interest in the reservation prior to June 25, 1890.

In addressing the merits, the district court reviewed the events leading up to the June 25 agreement and the 1891 Act, and found nothing to indicate that a reservation had been created or recognized for the Absentee Shawnees. The court held:

> [I]t is anomalous to suggest that by the 1891 Act, Congress at once created or recognized a reservation in favor of the [Absentee Shawnee] Tribe while agreeing to confirm allotments made to individual members of the Tribe and accept relinquishment or whatever claim, title or interest the Tribe had in the remainder of the land, which must have necessarily comprised the reservation then being created or recognized.

App., vol. III, at 867. Pointing to its holding that in view of the ICC opinion the Absentee Shawnee Tribe had no interest in the reservation before June 25, 1890,[4] and to the lack of any evidence that Congress or the executive

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[4] In so doing, the court noted that even if the ICC ruling were not given preclusive effect, the well-settled rule that Congressional intent to abrogate treaty rights must be clear and plain would require a finding that the 1867 Treaty granting the Potawatomi Tribe the exclusive right to the land had not been abrogated. App., vol. III, at 868.

branch created a reservation for the Tribe after that date and before the 1891 Act, the court viewed the Absentee Shawnees' agreement to relinquish any interest in the reservation as a quit claim deed. The court found additional support for its conclusion in the legislative history of the 1891 Act, which stated that the Absentee Shawnees were on the land selected for the Potawatomi Tribe under the 1867 Treaty " *'not . . . by any treaty or Executive order, but the Government has long known of their presence there.'* " *Id.* at 869 (quoting H.R.Rep. No. 51-3481, at 2-3 (1891)). Finally, the court pointed to the definition of a "reservation" set out in the Indian Reorganization Act, 25 U.S.C. § 461, which the court viewed as implicitly defining a reservation as land " 'created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase or otherwise.' " App., vol. III, at 872 (quoting 25 U.S.C. § 461). Because the record contained no evidence that land within the Potawatomi reservation had been set apart for the Absentee Shawnee Tribe within the language of section 461, the court ruled that "[a]t best the 1891 Act confirms an agreement with the [Absentee Shawnee] Tribe to make allotments to individual [Absentee Shawnee] members." *Id.* at 873. Accordingly, the court held that the IBIA opinion was contrary to clear legislative intent.

On appeal, the Absentee Shawnee Tribe contends the district court failed to afford the IBIA decision proper deference, arguing that the agency's decision was well-reasoned and factually supported.[5] The Tribe also asserts

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[5] The Absentee Shawnee Tribe also asserts that the district court improperly granted summary judgment because the record contains material issues of fact. We disagree. The

the earlier ICC decision is not binding on it because it was not a party or in privity with a party to that proceeding, and because the ICC lacked jurisdiction to decide the matter of tribal rights in the former reservation. Finally, the Tribe contends that if anyone is barred by the ICC proceeding, it is the Potawatomi Tribe.

The Absentee Shawnee Tribe does not challenge on appeal the IBIA determination that it is bound by the ICC's holding that the Potawatomi Tribe had exclusive ownership of the reservation as of June 25, 1890. Indeed, the Absentee Shawnee Tribe has maintained throughout this appeal that the issue is whether the Tribe had recognized rights in the Potawatomi reservation arising *after* June 25, 1890. Because the ICC opinion by its terms addresses only the status of the reservation *as of* that date, it could have no binding effect as to ownership of the land thereafter in any event, which is the issue the Tribe contends is dispositive here. Accordingly, we need not address whether the ICC had jurisdiction to determine the ownership of the reservation, or whether its opinion is binding on the government and/or the Tribe.[6] We

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historical facts are essentially undisputed and have been recited by both the ICC and the IBIA, as well as by the parties and the district court. It is not the facts which are in dispute, but their legal significance.

[6] The Absentee Shawnee Tribe's assertion that the Potawatomi Tribe is estopped by the ICC decision from pursuing the relief it requests in this action is without merit. The bar upon which the Absentee Shawnee Tribe relies is found at 25 U.S.C. § 70u, and provides that payment of a claim bars further demands against the United States arising from the controversy. The Potawatomi Tribe is not seeking additional compensation here and the bar thus does not apply.

therefore turn to the Tribe's argument that the district court erred in ruling that the IBIA decision is contrary to law and in holding, contrary to the IBIA, that the Tribe did not obtain rights in the Potawatomi reservation between June 25, 1890, and the passage of the 1891 Act.

III

We begin by considering the Absentee Shawnee Tribe's assertion that the district court erred in failing to accord the IBIA decision proper deference. Courts must, of course, defer to an agency's delegated authority to interpret by regulation the statute that it administers. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Nonetheless, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n. 9. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*

Although we are to give deference to an agency's construction of the statute it is entrusted to administer, here we are not concerned solely with construing the Secretary's discretion to place reservation land in trust under 25 U.S.C. § 465. The question before us on appeal is whether we must defer to the IBIA's decision that the Absentee Shawnee Tribe had a cognizable interest in the Potawatomi reservation after June 25, 1890. This assessment, in turn, requires that we decide whether the IBIA's

determination is contrary to Congressional intent. Accordingly, we must ascertain the intent of Congress in passing the 1891 Act, which embodies the agreements under which the reservation was ceded to the government. Because determining the status of the land at issue thus requires construing the 1891 Act, a statute that is not one Congress gave the agency discretion to administer, there is considerable force to the Potawatomi Tribe's argument that *Chevron* deference is not appropriate. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990). We need not decide the issue, however, because upon applying the traditional principles of statutory construction regarding treaty abrogation, we conclude that the IBIA's interpretation is clearly contrary to Congressional intent and thus not entitled to *Chevron* deference in any event.[7]

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[7] The IBIA likewise addressed the nature of the BIA's determination of the former reservation status of the Potawatomi reservation, and the degree of deference to be accorded that determination on review by the IBIA. *See Citizen Band Potawatomi Tribe of Okla. v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169, 176-78 (Sept. 12, 1995). The IBIA observed that it had previously recognized "the need for legal and historical underpinnings for BIA's definitions of former reservations under [25 C.F.R. § 151.2(f)]." *Id.* at 177-78. Accordingly the IBIA concluded that "the better view is that BIA's determination concerning former reservation status is a legal conclusion subject to de novo review by the [IBIA]." *Id.* at 178. We agree with the IBIA's characterization of the determination as a legal one requiring de novo review of its legal and historical bases. Moreover, the IBIA has acknowledged that

> the Secretary does not, by "defining" a former reservation under 25 C.F.R. 151.2(f), purport to

The Treaty creating the Potawatomi reservation set the land apart "for the exclusive use and occupancy" of the Potawatomi Tribe. *See* Treaty with the Potawatomi, *supra*, art. I. The IBIA concluded that the Potawatomi Tribe's treaty right to the exclusive use of the land was abrogated by the agreement between the Absentee Shawnees and the federal government embodied in the 1891 Act. The district court disagreed, holding that neither the language of the Act nor the circumstances surrounding its passage indicated a Congressional intent to abrogate the Potawatomi Tribe's pre-existing ownership rights.

"Congress has the power to abrogate Indians' treaty rights, though we usually insist that Congress clearly express its intent to do so." *South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (citations omitted). "Congressional intent to abrogate treaty rights will not be lightly inferred; such purpose must be 'clear and plain.' " *Oyler v. Allenbrand*, 23 F.3d 292, 296 (10th Cir.1994) (quoting *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986)). Accordingly, we must first examine the language of the Act itself to determine whether it contains a sufficiently clear expression of an intent to abrogate the Potawatomi Tribe's exclusive rights in the land by granting rights to the Absentee Shawnees.

> proclaim or create a true reservation or to vest the defined area with the attributes of reservation status for jurisdictional purposes. Rather, the Secretary simply describes areas with respect to which the reservation-based provisions of 25 C.F.R. Part 151 will apply.

Id. at 177 n. 11.

In the Act, both the Potawatomi Tribe and the Absentee Shawnees, in virtually identical language, ceded their interest in the land comprising the Potawatomi reservation. *See* 26 Stat. at 1016-17, 1019. The Act also provided that the United States would pay sums of money to both tribes for the relinquishment of their interests. *See id.* at 1018, 1020. These provisions are not an unambiguous expression of an intent to abrogate the Potawatomi Tribe's pre-existing treaty rights to the land. The language is at least as consistent with Congressional intent to receive a quit claim deed from the Absentee Shawnees as with an intent to recognize or create a legitimate claim of ownership rights. Indeed, we agree with the district court that it is most logical to view the above provisions as conveying a quit claim deed rather than as simultaneously granting and taking back an ownership interest.

Our view is reinforced by the difference in treatment accorded the Potawatomi Tribe and the Absentee Shawnees elsewhere in the Act. The Act addressed the 1867 Treaty, and provided that if the Potawatomi Tribe had paid the government for the reservation land in accordance with the Treaty provisions and the government had retained the funds, the government would pay that sum to the Tribe. *See* 26 Stat. at 1021. The Act also conferred jurisdiction on the Court of Claims to hear and determine the question of payment for the reservation, as well as all questions between the Potawatomi Tribe and the government relative to the Tribe's accounts under various treaties. *See id.* These provisions, which are addressed to the Potawatomi Tribe and not to the Absentee Shawnees,

clearly recognize the Potawatomi Tribe's exclusive reservation rights and are inconsistent with the creation of any such rights in the Absentee Shawnees.

Our view is confirmed by the legislative history of the Act, which states that "[t]he said Citizen Band of Pottawatomie Indians are now, and for more than twenty years have been, occupying a reservation in the Indian Territory . . . about 30 miles square, and containing an area of 575,870.42 acres. This tract was selected by said Indians under the provisions of the treaty of 1867. . . ." H.R.Rep. No. 51-3481, at 1 (1891). Significantly, the Report describes the Absentee Shawnees as follows:

> As to the Absentee Shawnees, it seems that some time about 1840 they left the main band then located upon the Shawnee Reservation in Kansas, and after roaming and hunting for some time settled down upon some of the country embraced within the limits of [the Potawatomi] reservation, where they have remained ever since. *They were not there by any treaty or Executive order,* but the Government has long known of their presence there.

Id. at 2-3 (emphasis added). This description unambiguously reveals that Congress did not view the Absentee Shawnees as having rights in the Potawatomi reservation, and it is hardly clear evidence of Congressional intent to create such rights by passage of the Act.

Nonetheless, the IBIA construed the 1891 Act and its legislative history as evincing an intent to create reservation rights in the Absentee Shawnee, relying on the opinion in *Shoshone Tribe of Indians,* 299 U.S. 476, 57 S.Ct. 244,

81 L.Ed. 360, which the IBIA viewed as addressing analogous factual circumstances. However, the historical facts upon which that decision was based are distinguishable in critical respects from those before us and the case is therefore inapposite. In *Shoshone Tribe*, the Tribe sued the United States for breach of a treaty granting the Tribe absolute and undisturbed use of reservation land. The Tribe alleged that this right had been breached when the federal government brought a band of Northern Arapahoes onto the reservation under military escort, established schools for their children, irrigated their ranches, and indicated "their equality of right and privilege" "[i]n numberless other ways." *Id.* at 488. The Court held that the Commissioner of Indian Affairs and Congress had acted "on the assumption that the occupancy of the Arapahoes, initiated, as we have seen, under military escort, was permanent and rightful." *Id.* at 489. Accordingly, the Court concluded that the Arapahoes obtained equal rights in the reservation as of the time they were placed there under military escort. *Id.* at 495-96.

The affirmative acts by the government that the Court found compelling in *Shoshone Tribe* are the very factors missing in the instant case. At most, the circumstances surrounding the 1891 Act reveal that Congress was aware of the Absentee Shawnees' presence on land that had been set aside by treaty for the exclusive use of the Potawatomi Tribe. Absent any affirmative actions indicating an intent to legitimize that presence, however, mere knowledge is simply not sufficient to abrogate the treaty rights granted the Potawatomi Tribe. Moreover, the Court in *Shoshone Tribe* concluded that the government's conduct from the outset of the Arapahoes' occupancy

indicated a Congressional intent to recognize their claim of rights in the reservation as of that time. *See id.* at 495. Here, to the contrary, the ICC ruled that the government's conduct up until July 25, 1890, did not establish such a claim of right on behalf of the Absentee Shawnees. We find no support for the IBIA decision in *Shoshone Tribe.*

In sum, we conclude that the language, legislative history, and historical circumstances of the 1891 Act do not evince a sufficiently clear Congressional intent to abrogate the Potawatomi Tribe's treaty right to the exclusive use and occupancy of its former reservation. The Secretary is therefore required under its own regulations to obtain the consent of the Potawatomi Tribe before acquiring such land in trust for the Absentee Shawnee Tribe.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff,	)	**CIV-92-2161-R**
v.	)	**(Filed May 22, 1996)**
L.W. COLLIER, JR., in his official capacity as the Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, and ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendants.	)	

ORDER

Before the Court are cross motions for summary judgment on Plaintiff's Amended Complaint filed by Plaintiff Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi Tribe") and Defendant L.W. Collier, Jr., Area Director of the Anadarko Area Office of the Bureau of Indian Affairs ("Area Director" or "BIA"). The Absentee Shawnee Tribe of Oklahoma ("A-S Tribe"), whose motion to intervene herein was granted pursuant to an agreement of the parties, has responded to the cross motions. The Court heard oral argument on the motions on April 3, 1996. The Court now addresses the motions, following a brief description of the history and current posture of this case.

The Potawatomi Tribe brought this action in 1992 after it learned, it is alleged, that the A-S Tribe "may have submitted an application to Defendant to place in trust" lands that are within the Potawatomi Reservation boundaries. Complaint at ¶ 11. A federal regulation promulgated pursuant to 25 U.S.C. § 465, which allows the Secretary of the Interior to take lands in trust for Indian tribes, provides as follows:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.
>
> 25 C.F.R. § 151.8 (1992).

Defendant Area Director, while refusing to admit or deny that any A-S applications were pending, took the position that the Potawatomi's consent was not required by the above-quoted regulation because the Potawatomi Tribe and A-S Tribe "share a common former reservation area for the purposes of fee simple . . . acquisitions, and neither are required to secure nonmember consents."[1]

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[1] Defendant Area Director has consistently maintained his position that the Potawatomi and A-S Tribes share a common former reservation. At oral argument on the parties' motions for summary judgment, Defendant Area Director disclaimed any reliance on the second clause of 25 C.F.R. § 151.8, i.e., Defendant Area Director does not contend that the Potawatomi Tribe's consent is not required to place land within its former

Letter from L.W. Collier, Jr. to Chairman of the Potawatomi Tribe dated September 17, 1992 (Exhibit "8" to Plaintiff's Motion for Summary Judgment filed November 20, 1992) at p. 2.

In this Court, Defendant Area Director filed a motion to dismiss on the grounds, *inter alia*, that the A-S was an indispensable party and that the Plaintiff had failed to exhaust its administrative remedy. The Court granted the motion on the first ground, not reaching the second. The Tenth Circuit reversed, holding that the BIA failed to satisfy its burden of demonstrating the nature of the A-S Tribe's interest in the property. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994). The Tenth Circuit said that the 1872 Act, giving the Secretary authority to grant allotments to members of the A-S Tribe, was irrelevant because it did not create any "undivided trust or restricted interest" of the A-S Tribe in the Potawatomi Tribe's land for purposes of 25 C.F.R. § 151.8, but merely granted the Secretary the power to allot land to individual A-S Tribe members. *Id*. Following remand, this Court directed the Potawatomi Tribe to pursue its administrative remedy, if any was available. On September 12, 1995, the Interior Board of Indian Appeals ("IBIA") affirmed the decision of the Defendant, concluding that the language of "the 1891 Act together with congressional statements in the legislative history, support a conclusion that Congress intended to recognize

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reservation in trust for the A-S Tribe because the A-S Tribe "already owns an undivided trust or restricted interest in the parcel[s] of land to be acquired." 25 C.F.R. § 151.8.

some rights of the [A-S Tribe] in the Potawatomi Reservation." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, IBIA 95-45-A, 28 IBIA 169, 182 (1995).

Following exhaustion, Plaintiff on October 10, 1995 filed an Amended Complaint, alleging that Defendant Area Director refuses to obtain written permission from the Potawatomi Tribe for A-S Tribe trust applications "as required by 25 C.F.R. § 151.8," despite Potawatomi Tribe requests, Amended Complaint at ¶ 12, and that the IBIA's decision is entitled to no deference from this Court because it is contrary to law, *id.* at ¶ 15, and affirmed a decision that was arbitrary, capricious and an abuse of discretion. *Id.* The Potawatomi Tribe further alleges that the A-S Tribe "never had a reservation and never shared a common reservation area with the Potawatomi." *Id.* at ¶ 17. The Potawatomi Tribe seeks a declaratory judgment that it has a described former reservation; that the A-S Tribe has never had a reservation that includes any part of the Potawatomi Reservation; and that prior to taking in trust for an Indian tribe any land located within the Potawatomi Reservation boundaries, the Defendant must seek and receive written approval thereof from the Potawatomi Tribe. Amended Complaint, Prayer. It also seeks a permanent injunction enjoining Defendant and all of his officers, agents, etc. from taking in trust for any Indian tribe any land located within the Potawatomi Reservation boundaries without first obtaining written permission from the Potawatomi Tribe. *Id.*

The Potawatomi Tribe has moved for summary judgment on its Amended Complaint. It asserts that the IBIA decision is contrary to law because the Potawatomi Tribe

has a former reservation with clearly-defined boundaries, while the A-S Tribe never had a reservation and does not have a former reservation in common with the Potawatomi Tribe, and because the IBIA failed to accord claim and/or issue preclusive effect to the decision of the Indian Claims Commission ("ICC") in *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Findings of Fact in Docket 96, 6 Ind. Cl. Comm. 646, 650-51 (1958). The Potawatomi Tribe does not take issue with Defendant Area Director's interpretation of 25 C.F.R. § 151.8 that the consent referred to therein is not required when a tribe seeks to place in trust status land on a reservation or former reservation which that tribe shares or has in common with another tribe. Rather, the Potawatomi Tribe's position is simply that the land in question is within the boundaries of what was formerly the reservation of the Potawatomi Tribe, exclusively, and that the A-S Tribe never had a reservation in common with the Potawatomi Tribe.

In response to the Potawatomi Tribe's motion and in support of his motion for summary judgment, Defendant Area Director asserts that the IBIA decision was not arbitrary or capricious. He argues that consistent with the Supreme Court's decision and directive in *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed.2d [sic] 360 (1937), the IBIA correctly referred to the 1891 Act, a compilation of the legislative history thereof and subsequent legislation and correctly concluded therefrom that Congress in the 1891 Act "intended to recognize some rights in the Absentee Shawnee in the Potawatomi Reservation," 28 IBIA 170, 183, and subsequent thereto, "Congress acted consistently with the 1891

Act, recognizing both tribes as having rights in the reservation." 28 IBIA at 186.

The A-S Tribe argues that the ICC decision can have no *res judicata* or collateral estoppel effect as to it because it was not a party to or in privity with either of the parties in that case. It also argues that the Potawatomi Tribe is barred by virtue of the ICC award and payment thereof from making the claim it makes herein.

I. STANDARD OF REVIEW

The IBIA decision is subject to judicial review under the Administrative Procedures Act, 5 U.S.C. § 701-706. The Court may set aside the agency's decision only if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, . . . (E) unsupported by substantial evidence . . . , or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2). Questions of law are subject to de novo review; an agency's failure to apply the correct legal standard or to provide the Court with an adequate basis to determine that the correct legal principles have been followed is grounds for reversal. *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d 1243, 1250 (10th Cir. 1995). On matters of statutory construction, "the judiciary is the final authority . . . and must reject administrative constructions which are contrary to clear congressional intent." *N.L.R.B. v. Viola*

Industries-Elevator Div., Inc., 979 F.2d 1384, 1392 (10th Cir. 1992) (*quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, ___ n. 9, 81 L.Ed.2d 694, 703 n. 9 (1984)). Thus, in reviewing an agency's construction of a statute which it administers, the Court first determines whether Congress has directly spoken to the precise question. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694, 702-03 (1984). If it has done so and its intent is clear, the reviewing court affords the agency's construction no deference as it must give effect to Congress' intent. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82, 81 L.Ed.2d at 703. If, however, the statute is silent or ambiguous with respect to the particular issue, the proper inquiry for the Court is whether the agency's interpretation of the statute is a permissible one, *id.*, that is, one that is "plausible . . . and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233, 249 (1991). In making this determination, "substantial deference" or "considerable weight" is accorded to the interpretation or construction of a statute by the agency which is authorized to administer it. *Rust v. Sullivan*, 500 U.S. at 184, 111 S.Ct. at ___, 114 L.Ed.2d at 249; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 844, 104 S.Ct. at ___, 81 L.Ed.2d at 703-04. The principle of deference to administrative interpretations is followed whenever a decision as to the meaning or reach of a statute involves reconciling conflicting policies and where a full understanding of statutory policy has depended on more than ordinary knowledge respecting the matters subjected to agency

regulation. *Chevron*, 467 U.S. at 844, 104 S.Ct. at ___, 81 L.Ed.2d at 704. Thus, if any agency choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, a court does not disturb that choice unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Id.*

Even greater deference is accorded to an agency's interpretation of its own regulations. *See Culbertson v. United States Department of Agriculture*, 69 F.3d 465, 467 (10th Cir. 1995). An agency's interpretation of its own regulation is entitled to controlling weight unless it violates the Constitution or a federal statute, is plainly erroneous or inconsistent with the regulation. *Stinson v. United States*, 508 U.S. 36, ___, 113 S.Ct. 1913, 123 L.Ed.2d 598, 608 (1993); *Culbertson v. U.S. Department of Agriculture*, 69 F.3d at 467. *See Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, ___, 90 L.Ed.2d 921, 934 (1986); *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1267 (10th Cir. 1994).

The standard of review herein may also be affected by whether Congress has expressly or impliedly delegated to the Department of Interior the authority to elucidate a specific statutory provision. Where the delegation is explicit, such as where Congress provides by statute that the Secretary may make rules to carry out a statute or chapter, *see Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d at 1248, or where "Congress has explicitly left a gap for the agency to fill," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843, 104 S.Ct. 2778, 81 L.Ed.2d at 703, the agency's legislative regulations are accorded controlling weight unless they are arbitrary,

capricious or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844, 104 S.Ct. at ___, 81 L.Ed.2d at 703; *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d at 1248. Where the legislative delegation to an agency is implicit rather than explicit, a court may not substitute its construction of a statutory provision for a reasonable interpretation by the agency. *Id.*

II. CLAIM OR ISSUE PRECLUSION

The IBIA's conclusion that the decision of the Indian Claims Commission in *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Findings of Fact in Docket 96, 6 Ind. Cl. Comm. 646 (1956), is not determinative of the rights in the reservation after June 25, 1890 is not contrary to law. The Court agrees with the IBIA that the effect of the ICC's decision was to determine the Potawatomi Tribe's ownership of the 575,877 acres known as the Oklahoma Reservation on June 25, 1890, when or immediately before the taking occurred, and that the Potawatomi Tribe was entitled to compensation or additional compensation for that land other than that allotted to its own members. However, the IBIA did not expressly reach or decide whether Defendant Area Director is precluded from asserting that the A-S Tribe had an undivided ownership interest in the reservation prior to the taking. The Court concludes that he is.

When an issue of fact or law is actually litigated and necessarily determined by a valid, final judgment, that determination may be conclusive in a subsequent action as against the parties to the first action and those in

privity with them, whether the second action involves the same or a different claim. *See Restatement of Judgments* 2d §§ 27 & 34 (1982); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1272-73 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 705, 133 L.Ed.2d 661 (1996). *See also Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308, 313 (1980). Application of issue preclusion requires 1) that the same issue previously decided is identical with that presented in the action in question; 2) that the issue was actually litigated in the first action, after a full and fair opportunity to do so; 3) that the issue was actually decided in the first action; 4) that a final, valid judgment on the merits was entered in the first action; 5) that determination of the issue was necessary to the judgment in the first action; 6) that the party against whom issue preclusion is asserted was a party to or in privity with a party to the first action; and 7) that there are no special circumstances or considerations that warrant remission of ordinary preclusion rules. *See Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 686-90 (10th Cir. 1992), *cert. denied*, 507 U.S. 1042, 113 S.CT. 1879, 123 L.Ed.2d 497 (1993). 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416 (1981) at p. 137-38.

Whether the A-S Tribe had any title to or ownership interest in the 575,877 acres known as the "Oklahoma Reservation" and referred to herein as the Potawatomi Reservation was actually litigated before and decided by the Indian Claims Commission:

> The defendant contends that the Citizen Band never became entitled to that portion of the Oklahoma Reservation occupied by the Absentee Shawnee Indians, and it contends that

the Citizen Band, in fact, consented and agreed that the Shawnees should remain on the land undisturbed. We do not find any evidence in the record of any consent or waiver on the part of the Citizen Band to a tract of land containing less than 900 square miles. That the Citizen Band did not waive its claim of ownership of the lands occupied by the Shawnee is evidenced by the Band's willingness to have their west boundary extended sufficiently to add an equivalent area of land to that occupied by the Shawnees within the 900 square mile tract that had been approved for the Citizen Band by the Government, if the Government desired to let the Shawnee remain permanently on the Oklahoma Reservation tract. (Finding 9)

It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not "locations made for them" by the Government. They were, as defendant states, "in the nature of squatters" (Def. Br., p. 9) whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive branch of the Government or by the Citizen Band. (Finding 8)

The agreement of June 26, 1890 (26 Stat. 1019) wherein the Absentee Shawnees ceded the entire Oklahoma Reservation for a consideration of $65,000 and confirmation of their allotments cannot be construed as a ratification of a "reservation title" or of a use and occupancy title from time immemorial. Their possessory right was in the nature of a tenancy at will; they were in "peaceable possession" after the arrival of the

> Citizen Band only because the Citizen Band expressed a willingness not to disturb them provided the Government extended the Citizen Band's reservation to include an equivalent area westward. (Finding 8)
>
> Opinion of the Commission, *Citizen Band of Potawatomi Indians of Oklahoma v. United States of America*, Docket No. 96 (September 18, 1958) at 663-66.

The Indian Claims Commission's determination of this issue was necessary to its judgment because the United States therein argued that the Potawatomi Tribe never became entitled to that portion of the Oklahoma Reservation occupied by the A-S Tribe and, had the A-S Tribe had some superior or co-equal ownership interest in the land in question, an award of compensation to the Potawatomi Tribe could have been avoided or reduced commensurate with the A-S Tribe's ownership interest. No argument is made that the United States did not have a full and fair opportunity to litigate the issue of the A-S Tribe's interest in the reservation. Nearly one year elapsed between the time when the parties before the ICC stipulated as to the issues to be determined therein and entry of the ICC's Findings of Fact and Opinion. Articulation and consideration of the arguments of the United States in the ICC's Opinion and Findings indicate that the United States had a full and fair opportunity to litigate the interest of the A-S Tribe in the reservation in order to avoid payment of compensation to the Potawatomi Tribe for at least that portion of the reservation which had been occupied and used by the A-S Tribe and/or allotted to its members.

A final written determination or report determining that the Potawatomi Tribe was entitled to recover $797,508.99 was filed on August 27, 1968. *See* 28 IBIA 176. Congress appropriated funds to pay the award by the Act of July 22, 1969, 83 Stat. 49, 62, and authorized use of the funds to pay the award by Act of September 16, 1970, 84 Stat. 838. *Id.* The ICC's final determination that the Potawatomi Tribe was entitled to the award of compensation in its report to Congress was statutorily given "the effect of a final judgment of the Court of Claims." Indian Claims Commission Act of August 13, 1946, § 22(a), 60 Stat. 1049, 1055 (previously codified at 25 U.S.C. § 77u (a)) (repealed).

"Where a suit binds the United States, it binds its subordinate officials." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S.Ct. 907, 917, 84 L.Ed. 1263, 1276 (1940). Thus, Defendant Area Director herein is in privity with the United States, the Defendant in the first action, and may be precluded from relitigating the issue litigated before the ICC by it. *See Tait v. Western Maryland Railway*, 289 U.S. 620, 627, 53 S.Ct. 706, 77 L.Ed. 1405, 1409-10 (1933); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987) (litigation involving government binds government officials sued in their official capacities in later actions); *Mathis v. Laird*, 457 F.2d 926, 927 (5th Cir. 1972), *cert. denied*, 409 U.S. 871, 93 S.Ct. 201, 34 L.Ed.2d 122 (1972) (Secretary of Defense is in privity with the United States); *Bloomquist v. Brady*, 894 F. Supp. 108, 114 (W.D.N.Y. 1995) (Secretary of the United States Treasury is in privity with the United States).

Defendant Area Director argued before the IBIA and now argues before this Court that the ICC decision is not

entitled to issue preclusive effect because the ICC "was not vested with the authority to decide issues of title," and thus, "was clearly not a court of competent jurisdiction for purposes of res judicata or collateral estoppel." Brief in Support of United States, Response to Plaintiff's Motion at p. 14. Citing Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, and *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987), Defendant Area Director argues that the ICC was authorized to grant only monetary awards in satisfaction of Indian claims as opposed to a declaratory judgment granting title to a particular tribe. *Id.* at p. 13.

Section 2 of the Indian Claims Commission Act ("ICCA") does not on its face limit the jurisdiction of the Indian Claims Commission to the granting of monetary awards, only. *See* 60 Stat. at 1050 (formerly codified at 25 U.S.C. § 70a). However, the Indian Claims Commission in an early opinion construed its remedial powers under the ICCA as limited to granting monetary relief. *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987), *citing Osage Nation of Indians v. United States*, 1 Ind. Cl. Comm. 54, 65 (1948), *rev'd on other grounds*, 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896, 72 S.Ct. 230, 96 L.Ed. 672 (1951) and *Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 35 Ind. Cl. Comm. 457, 47 (1975), *aff'd* 209 Ct. Cl. 43, 531 F.2d 495, *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976). The legislative history of bills extending the life of the ICC indicates that this interpretation of the ICCA was correct – that the ICCA reflected a congressional intent that "[t]ribes with valid claims would be paid in money" and that "[n]o lands would be returned to a tribe." *Id.*

(quoting Authorizing Appropriations for the Indian Claims Commission for Fiscal Year 1977: Hearing on H.R. 11909 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess. 48 (1976)). *See also* Indian Claims Commission Act Extension and Enlargement. Hearing on H.R. 2536 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Indian and Insular Affairs, 90th Cong., 1st Sess. 83 (1967). Nevertheless, the ICC was not prevented by this limitation on the remedy it could provide from determining the status of a tribe's title to a reservation, as is well-illustrated by the Tenth Circuit's decision in *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1445 (10th Cir. 1987) and the case of *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), a case under one of the special jurisdictional acts which were precursors to the ICCA and which is cited in the *Navajo Tribe* decision: Claims or assertions of title could be made in and heard by the Court of Claims or the ICC but the tribes would simply have to accept monetary compensation if their claims to title were valid. *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d at 1467. Contrary to Defendant Area Director's assertion, the ICC was a court or quasi-judicial commission with the authority to decide issues of title, even though it could not quiet title, and hence was a competent tribunal for purposes of issue preclusion. What the Tenth Circuit said in relation to finality for purposes of the ICCA statute of limitations, ICCA, § 12 (formerly codified at 25 U.S.C. § 70k (1976)) aptly describes the reason why the ICC's determination that

the A-S Tribe had no ownership interest in the "Oklahoma Reservation," i.e., the Potawatomi Reservation, as of June 25, 1890, should be accorded finality vis-a-vis the Defendant Area Director through issue preclusion:

> As we interpret section 2 of the ICCA, the underlying substantive claim – not the character of relief requested by the Tribe – must determine the Commission's jurisdiction. If the character of the relief sought were determinative, the ICCA's express policy of finality could be undermined by any Indian tribe that, having failed to pursue its remedy under the ICCA, now prefers the return of its lands to money damages.
>
> *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d at 1467-68.

The Court concludes that the limitation on the ICC's remedial powers does not constitute a special circumstance which would render application of ordinary rules of issue preclusion unfair or would warrant a redetermination of an issue actually and necessarily decided by it.

In accordance with the foregoing, the Court concludes that Defendant Area Director is estopped from relitigating the issue of whether the A-S Tribe owned an interest in the Potawatomi Reservation as of June 25, 1890. Because the United States is a trustee or fiduciary for the A-S Tribe, *see United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580, 596 (1983); *Cheyenne-Arapahoe Tribes of Oklahoma*, 966 F.2d 583, 589-90 (10th Cir. 1992), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1643, 123 L.Ed.2d 265 (1993), the A-S Tribe was in privity with and represented by the United States in proceedings

before the ICC and is therefore also bound by the ICC decision and precluded from relitigating the issue of its ownership interest in the Potawatomi Reservation, if any, as of June 25, 1890. *See Restatement of Judgments 2d* § 41 & Comments a, c & d. It is true that the United States also stood in a trust or fiduciary relation to the Potawatomi Tribe, but inasmuch as it advanced a claim of ownership for and on behalf of the A-S Tribe, a claim or position adverse to the Potawatomi Tribe, the United States, dual trustee status does not, in the Court's view, pose an impediment to the operation of issue preclusion against the A-S Tribe. *Cf. Nevada v. United States*, 463 U.S. 110, 135-143, 103 S.Ct. 2906, ___, 77 L.Ed.2d 509, 527-32 (1983) (tribe, which had been represented by United States in prior water rights litigation, could not relitigate that claim even though the United States had also represented the Newlands Project, which was under the management of the TCID at the time the first decree was entered, against those who could utilize the first decree as a defense, including the TCID and Project landowners; the federal government does not compromise its obligation to represent one party where Congress obliges it to simultaneously represent another). While both Defendant Area Director and Intervenor A-S Tribe are precluded from relitigating whether the A-S Tribe owned or had acquired any ownership interest in the Potawatomi Reservation as of June 25, 1890,[2] they are not precluded from claiming or

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[2] Intervenor A-S Tribe argues that the Potawatomi Tribe is precluded by *res judicata*, collateral estoppel and/or Section 22 of the Indian Claims Commission Act, 25 U.S.C. § 70u (now repealed) from pursuing any further claim against the United States related to any matters involved in the proceedings before

asserting that the A-S Tribe had or acquired an ownership interest in or shared ownership of the Potawatomi Reservation based upon events subsequent to June 25, 1890.[3]

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the Indian Claims Commission in *Citizen Band of Potawatomi Indians of Oklahoma* because the Potawatomi Tribe has been fully compensated for lands within the Potawatomi Reservation which were taken. A-S Tribe's Response to Plaintiff's Motion for Summary Judgment and Federal Defendant's Cross-Motion for Summary Judgment at p. 8. The Court agrees with the Potawatomi Tribe that it is not precluded by virtue of the judgment in the ICC case or by 25 U.S.C. § 70u from litigating construction of the phrase "former reservation" in a BIA regulation, the existence of a former Potawatomi Reservation and the non-existence of a former A-S Tribe reservation or of the A-S Tribe's interest in the former Potawatomi Reservation.

[3] The ICC's determination of the issue of whether the United States' agreement with the A-S Tribe on June 26, 1890 constituted a "ratification" of a "reservation title" or "use and occupancy title" was not necessary to the ICC's judgment inasmuch as the parties before the ICC stipulated that the Potawatomi Tribe's compensable interest in the Oklahoma Reservation was to be valued as of June 25, 1890. *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Findings of Fact in Docket No. 96, 6 Ind. Cl. Comm. 646, 647 (1958). The ICC approved the stipulation, thus implicitly finding that the Potawatomi Tribe's land in the reservation was taken on June 25, 1890. Moreover, the ICC resolved the issue of ratification by focusing on the nature of the Absentee Shawnee's possessory rights prior to the agreement of June 26, 1890. Opinion of the Commission, *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Docket No. 96 (1958) at 664-65. The ICC was clearly of the opinion that the United States could not by the agreement of June 26, 1890, approve or sanction any greater interest for the A-S Tribe than it had theretofore in fact acquired. Whether by that agreement the United States ratified an interest already acquired is not the same issue as whether by that agreement or by a subsequent Act of Congress confirming and ratifying that agreement the United States recognized or

Phenix [sic] *City Board of Education*, 849 F.2d 1376, 1383 (11th Cir. 1988); *Kilgoar v. Colbert County Board of Education*, 578 F.2d 1033, 1035 (5th Cir. 1978); *Dawkins v. Nabisco, Inc.*, 549 F.2d 396, 397 (5th Cir.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977) (claims based upon conduct or events subsequent to prior litigation are not precluded). Thus, the Court reviews the IBIA decision to determine whether the IBIA's conclusion that the A-S Tribe has present-day rights in the Potawatomi Reservation, based upon Congressional intent to recognize some rights of the A-S Tribe in that reservation expressed in the Act of March 3, 1891, 26 Stat. 989, which may be recognized by Defendant Area Director for purposes of 25 C.F.R. § 151.8, is contrary to law, arbitrary or capricious.

III. WHETHER THE CONCLUSION OF THE IBIA THAT THE LAND IN QUESTION IS THE RESERVATION OF BOTH THE CITIZEN BAND AND THE ABSENTEE SHAWNEE TRIBE IS CONTRARY TO LAW

The IBIA concluded that "the Absentee-Shawnee Tribe has present-day rights in the Potawatomi Reservation which may be recognized by the BIA for purposes of 25 C.F.R. 151.8." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169, 188. The IBIA concluded that "the language of the 1891 Act, together with congressional statements in the legislative history, support a conclusion

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intended to recognize a reservation interest in favor of the A-S Tribe, whether it had theretofore existed or not.

that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation." *Id.* at 183. The IBIA also found nothing in the history of the Potawatomi Reservation subsequent to 1891 which alters Congress' recognition in the 1891 Act of the A-S Tribe's rights in the Potawatomi Reservation. *Id.* at 188.

The Act of March 3, 1891, 26 Stat. 989 (the "1891 Act") confirmed a June 25, 1890 agreement with the Potawatomi Tribe, 26 Stat. 1016, and a June 26, 1890 agreement with the A-S Tribe. In the June 25, 1890 agreement, which is incorporated in the 1891 Act, the Potawatomi Tribe ceded, relinquished and surrendered absolutely and forever to the United States all of its claim, title and interest to the land constituting the Potawatomi Reservation in consideration of confirmation of past and future allotments to individual members of the tribe and payment of $160,000, with payment thereof to be made per capita. The agreement also provided that if it was ascertained that the Potawatomi Tribe paid the United States for the tract of land in question in accordance with the Treaty of 1868 and the United States had retained $119,790.00, then the United States would pay the tribe that sum as well, again in per capita payments. The Agreement of June 26, 1890 with the A-S Tribe, which was also incorporated in the 1891 Act, was virtually identical. In it, the A-S tribe ceded, relinquished and surrendered to the United States all of their claim, title and interest to the same property, that described in O.T. Morrill's survey under his contract of Sept. 3, 1872, in consideration of confirmation of allotments received and to be received, and $65,000 in cash, paid per capita.

Pursuant to the 1891 Act, President Benjamin Harrison issued a Proclamation on September 18, 1891 declaring that all of the lands acquired from, *inter alia*, the Citizen Band of Potawatomi Indians and the Absentee Shawnee Indians, by the Agreements of June 25 and 26 of 1890, respectively, and confirmed and ratified by the 1891 Act, except for the lands allotted to them pursuant to the agreements, be opened to settlement at noon on September 22, 1891. Proclamation of September 18, 1891, 27 Stat. 989. The Proclamation referred to a "Schedule of lands within the Sac and Fox, Iowa, Pottawatomie (and Absentee Shawnee) Reservations, in Oklahoma Territory, opened to settlement by proclamation of the President dated September 18, 1891" for a description of the lands to be so opened to settlement. 27 Stat. 992. The Proclamation gave notice that the land so opened to settlement had been duly ordered to be attached to the eastern and Oklahoma land districts, respectively, in the Territory of Oklahoma. 27 Stat. 993. In the description of the land to be attached to those districts, no reference is made to an "Absentee Shawnee Indian Reservation" or to a "Pottawatomie (and Absentee Shawnee) Reservation," the only relevant reference being to the "Pottawatomie Indian Reservation." *Id.*

The 1891 Act, which had the obvious effect of extinguishing or diminishing Indian land title to the Potawatomi Reservation, contains no clear or express creation or recognition of a reservation for the A-S Tribe. And it is anomalous to suggest that by the 1891 Act, Congress at once created or recognized a reservation in favor of the A-S Tribe while agreeing to confirm allotments made to individual members of the Tribe and

accept relinquishment of whatever claim, title or interest the Tribe had in the remainder of the land, which must have necessarily comprised the reservation then being created or recognized.

In view of the facts that as of June 25, 1890, the A-S had no interest in the Potawatomi Reservation, *see* II, *supra*,[4] and that there is no evidence of a Congressional

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[4] This is true even if issue preclusion did not apply. It is not disputed herein, and the IBIA correctly concluded that the Potawatomi Tribe have a reservation or former reservation in Oklahoma created "for the exclusive use and occupancy of that tribe" by Treaty of February 27, 1867, 15 Stat. 531 ratified with amendments July 25, 1868, 15 Stat. 534-37, with amendments accepted August 4, 1868, 15 Stat. 537, and proclaimed August 7, 1868, 15 Stat. 537-38, the tract of land selected pursuant to the treaty having been approved by the Secretary of the Department of the Interior on November 9, 1870. "Congress' intention to abrogate Indian treaty rights [must] be clear and plain." *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 2220, 90 L.Ed.2d 767, 773 (1986). Thus, absent explicit statutory language or other clear evidence that Congress actually considered the conflict between its intended action and the Indian treaty rights and chose to resolve that conflict by abrogating or modifying the treaty, an intent to abrogate or modify a treaty will not be imputed to Congress. *See South Dakota v. Bourland*, 508 U.S. 679, ___, 113 S.Ct. 2309, ___, 124 L.Ed.2d 606, 622 (1993); *United States v. Dion*, 476 U.S. at 739-40, 106 S.Ct. at ___, 90 L.Ed.2d at 773-74; *Oyler v. Allenbrand*, 23 F.3d 292, 298 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 278, 130 L.Ed.2d 195 (1994); *Equal Employment Opportunity Commission v. Cherokee Nation*, 871 F.2d 937, 938-39 (10th Cir. 1989). There was no evidence before the IBIA and there is no evidence before this Court of any intent by Congress, as expressed in any act or agreement entered into prior to June 25, 1890 or the legislative history thereof to abrogate or modify the Potawatomi Tribe's treaty right to "exclusive use and occupancy" of its reservation so as to grant the A-S Tribe a

Act, proclamation or Executive order creating a reservation for the A-S after that date and prior to the 1891 Act, nor of a purchase of land for or by the A-S, the only reasonable construction of language in the June 26, 1890 agreement, accepted and ratified by Congress in the 1891 Act, that the A-S Indians "relinquish . . . to the United States, all their claim, title and interest of every kind and character" and that in consideration, thereof, the United States would pay the A-S $65,000, 27 Stat. at 1019, 1020, is that of a quitclaim deed, i.e., that the A-S Tribe claimed some right or interest in the property which it agreed to relinquish and the United States agreed to pay the A-S Tribe $65,000 (and to confirm allotments made to individual A-S Tribe members) in consideration for the A-S Tribe's relinquishment of such claim.

Any doubt or ambiguity as to congressional intent expressed in the 1891 Act is resolved by reference to the legislative history of that Act. House of Representatives Report No. 3481, 51st Cong., 2d Sess. 1 (1891) refers to the Citizen Band of Potawatomi Indians and the Absentee Shawnee Indians as both "residing on the Potawatomi Reservation." Although the report states that the bill under consideration provides for ratification of agreements with both "for the relinquishment of the respective rights upon and to said reservation," the report describes the reservation as a 575,870.42 acre tract selected by the Potawatomi Tribe under the provisions of the 1867 Treaty, which selection was approved by the Secretary of the

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common interest in or some rights in the Potawatomi Reservation.

Interior on November 9, 1870 and, with respect to the A-S Tribe, states as follows:

> As to the Absentee Shawnee, it seems that some time about 1840 they left the main band then located upon the Shawnee Reservation in Kansas and after roaming and hunting for some time settled down upon some of the country embraced within the limits of this reservation, where they have remained ever since. *They were not there by any treaty or Executive order, but the Government has long known of their presence there.* They have been industrious and wholly self-supporting, and during the war were loyal to the United States. They have also been receiving allotments under said severalty act. The Commissioners agreed that they should be paid *for the relinquishment of their claims,* after taking allotments, $65,000, which item, and the $160,000, to the Potawatomies, make up the amount of the appropriation in the bill.
>
> H.R. Rep. No. 3481, 51st Cong., 2d Sess. 1, 2-3 (1891) (emphasis added).

As indicated above, the Court is the final authority on matters of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, ___ n. 9, 81 L.Ed.2d 694, 703 n. 9 (1984); *N.L.R.B. v. Viola Industries-Elevator Div., Inc.*, 979 F.2d 1384, 1392 (10th Cir. 1992). In determining whether Congress' intent is clear, the Court is not limited to the language of the act or statute but must read the language in the context of the object and policy of the law. *See Dole*

v. United Steelworkers of America, 494 U.S. 26, 35, 110 S.Ct. 929, 934, 108 L.Ed.2d 23 (1990); *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), *cert. denied*, 500 U.S. 916, 111 S.Ct. 2011, 114 L.Ed.2d 98 (1991). The inquiry under the first prong of the *Chevron* test is not over merely because language employed by Congress in an act or statute is ambiguous. *Exxon Corp. v. Lujan*, 970 F.2d 757, 761 (10th Cir. 1992). Traditional tools of statutory construction must be employed to determine whether Congress has addressed the issue, *id.* (quoting *I.N.S. v. Cardoze-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434, 457 (1987)), legislative history being among the most frequently used of those tools. *Id., citing Salt Lake City v. Western Area Power Administration*, 926 F.2d 974, 978-79 (10th Cir. 1991). Having concluded herein that the legislative history clearly reveals Congress' understanding that the Potawatomi Tribe had a reservation created by treaty consisting of 575,870 plus acres in the Territory of Oklahoma and that the A-S Tribe settled upon some of the land in that reservation but were not there by any treaty or Executive order, and its intent in the 1891 Act to extinguish whatever claim the A-S Tribe had to land within the Potawatomi Reservation other than that allotted and to be allotted to its individual members, by, in effect, accepting a quitclaim agreement in exchange for $60,000 and confirmation of allotments, the IBIA and this Court are bound to give effect to it. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843 n. 9, 104 S.Ct. at ___ n. 9, 81 L.Ed.2d at 703 n. 9; *Exxon Corp. v. Lujan*, 970 F.2d at 761. A construction of the 1891 Act as congressional recognition of rights of the A-S Tribe in the Potawatomi Reservation is contrary to clearly

expressed congressional intent and therefore contrary to law.

There is yet another reason why the Court finds the conclusion of the IBIA that the A-S Tribe has present-day rights in the Potawatomi Reservation which may be recognized by the BIA for purposes of 25 C.F.R. § 151.8 contrary to law.

Subsection of Section 151.2 of the Code of Federal Regulations defines "Indian reservation" as follows:

> Unless another definition is required by the Act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having government jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.
>
> 25 C.F.R. § 151.2(f).

To determine whether the definition of "reservation" in 25 C.F.R. § 151.2(f) or the IBIA's conclusion, applying that definition, is contrary to law, the Court employs the first prong of the *Chevron* inquiry: Is Congress' intent clear as to the meaning of the term "reservation" as used in 25 U.S.C. § 465, the statute pursuant to which the regulations in Part 151 of the Code of Federal Regulations, including 25 C.F.R. §§ 151-2(f) and 151.8, were promulgated. The term is not defined in Section 465. However, "statutory terms are often clarified by the remainder of the statutory scheme – because the same

terminology is used elsewhere in a context that makes [the term's] meaning clear. . . . *Rake v. Wade*, 508 U.S. 464, ___, 113 S.Ct. 2187, 2193, 124 L.Ed.2d 424, 434 (1993). The "Definitions" section of the Indian Reorganization Act, 25 U.S.C. § 479, does not define a "reservation" but Section 1 of the Indian Reorganization Act, 25 U.S.C. § 461, states that "[o]n or after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase or otherwise, shall be allotted in severalty to any Indian." This Section implicitly but clearly defines an Indian reservation as an area of land created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order purchase or otherwise. There was no evidence before the IBIA and there is no evidence before this Court of any treaty or agreement with the A-S Tribe, Act of Congress, Executive order, purchase or any other act setting apart land within the boundaries of the Potawatomi Reservation for the use of the *A-S Tribe*[5]. At

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[5] This is true as to the period prior to June 26, 1890 as well. Thus, even if the ICC decision does not preclude redetermination of whether the A-S Tribe has a reservation in common with the Potawatomi Tribe or an undivided interest in the Potawatomi Reservation, or the A-S Tribe is not bound by the ICC's decision, the Secretary's "definition" of the Potawatomi Reservation as the former reservation of the A-S Tribe is inconsistent with the definition of reservation in the statute pursuant to which the regulation was promulgated and therefore contrary to law.

With respect to the period subsequent to June 25, 1890, neither the Act of August 11, 1964, 78 Stat. 292, authorizing conveyance of a tract of 33.23 acres within the boundaries of the former Potawatomi Reservation to the A-S Tribe; the Act of January 2, 1975, P.L. 93-590, 88 Stat. 1922, authorizing the A-S

best the 1891 Act confirms an agreement with the A-S Tribe to make allotments to individual A-S Tribe members.

CONCLUSION

The decision of the Indian Claims Commission precludes Defendant Area Director and Intervenor A-S Tribe from relitigating the A-S Tribe's interest in the Potawatomi Reservation as of June 25, 1890. The IBIA's

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Tribe to reconvey the tract conveyed to it by the 1964 Act back to the United States in trust for the A-S Tribe; nor the BIA's approval of the A-S Tribe's Self-Governance Compact and its Constitution, recognizing some A-S territorial jurisdiction within the original Potawatomi Reservation boundaries, could create a *former* reservation of the A-S Tribe in common with that of the Potawatomi Tribe. *Compare with* 25 C.F.R. § 151.2(f). Indeed, neither the Area Director nor the A-S Tribe argues that the 1964 Act, the 1975 Act or the BIA's approval of the A-S Tribe's Compact and Constitution created either a current or former reservation for the A-S Tribe. The IBIA examined the Act of September 13, 1960, 74 Stat. 903 (authorizing conveyance of a 57.99-acre tract within the former Potawatomi Reservation to the Potawatomi "subject to the right of the [A-S and other tribes] to use the Potawatomi community house that may be constructed and maintained thereon", the 1964 Act, legislative history of the 1960 and 1964 Acts and the 1975 Acts "for the purpose of shedding further light upon Congress' intent in 1891 and also for the purpose of determining whether Congress has taken any action to alter the result it evidently intended in 1891." *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs*, 28 IBIA 169, 185. The IBIA simply found "nothing in the history of the Potawatomi Reservation subsequent to 1891 which alters Congress' recognition in the 1891 Act of Absentee Shawnee rights in the Potawatomi Reservation." *Id.* at 188.

conclusion that the ICC decision is not issue-preclusive as to the A-S Tribe's rights in that reservation subsequent to June 25, 1890 is not contrary to law, but the IBIA's conclusion that the A-S Tribe has rights in the Potawatomi Reservation which may be recognized by the BIA for purposes of 25 C.F.R. § 151.8 is contrary to law. Plaintiff is entitled to summary judgment on its Complaint. Plaintiff's motion for summary judgment is **GRANTED**. Defendant Area Director's cross motion for summary judgment is **DENIED**.

IT IS SO ORDERED this 22nd day of May, 1996.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT
DOCKET ON 5-22-96

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CITIZEN BAND OF POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff,	)	Case No. CIV-92-2161-R
v.	)	
L.W. COLLIER, JR., in his official capacity as the Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, Defendant.	)	

(Filed Mar. 15, 1996)

ORDER GRANTING MOTION TO INTERVENE

The motion of the absentee Shawnee Tribe of Oklahoma for intervention was submitted and supported by memorandum. Now, the court being fully advised and the motion having been submitted and good cause appearing; therefore,

IT IS ORDERED that the motion of the Absentee Shawnee Tribe of Oklahoma be and it is granted. The Absentee Shawnee Tribe of Oklahoma shall hereby be allowed to enter the instant matter as a party defendant conditioned on the filing of a wavier of immunity by the Absentee-Shawnee Tribe of Oklahoma. Attached hereto is

a letter and a draft resolution regarding sovereign immunity which will be approved by the Absentee Shawnee Tribe of Oklahoma at their Executive Committee meeting on Saturday, March 16, 1996.

/s/ David L. Russell
JUDGE

Approved as to Form:

/s/ F. Browning Pipestem
F. Browning Pipestem, OBA #7171
F. BROWNING PIPESTEM & ASSOCIATES
111 N. Peters, Suite 200
Norman, OK 73069
(405) 329-3840
ATTORNEY FOR THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA

/s/ Michael Minnis
Mr. Michael Minnis
Mr. David McCullough
Michael Minnis & Associates
3160 Liberty Tower, 100 N. Broadway
Oklahoma City, OK 73102-8606

IN REPLY REFER TO:

[LOGO]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

CITIZEN BAND POTAWATOMI INDIAN TRIBE
OF OKLAHOMA
v.
ANADARKO AREA DIRECTOR, BUREAU OF
INDIAN AFFAIRS

IBIA 95-45-A Decided September 12, 1995

Appeal from a decision concerning he acquisition of land in trust for the Absentee-Shawnee Tribe within the former Potawatomi Reservation in Oklahoma.

Affirmed.

1. Board of Indian Appeals: Jurisdiction – Indians: Lands: Trust Acquisitions – Indians: Reservations: Definition

   The Bureau of Indian Affairs' definition of a "former reservation" under 25 CFR 151.2(f), for purposes of acquisition of land in trust for Indians, is subject to *de novo* review by the Board of Indian Appeals.

2. Indians: Lands: Trust Acquisitions – Indians: Reservations: Definition

   For purposes of 25 CFR Part 151, the Citizen Band Potawatomi Indian Tribe and the Absentee-Shawnee Tribe both have rights in the former

Potawatomi Reservation in Oklahoma, and neither is required to obtain the consent of the other under 25 CFR 151.8.

APPEARANCES: Michael Minnis, Esq., and David McCullough, Esq., Oklahoma City, Oklahoma, for appellant; Keith S. Francis, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Citizen Band Potawatomi Indian Tribe of Oklahoma (Citizen Band) seeks review of a September 17, 1992, letter signed by the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA). The letter stated Area Office policy concerning the acquisition of land in trust for the Absentee-Shawnee Tribe of Indians of Oklahoma (Absentee-Shawnee Tribe) within the former Potawatomi Indian Reservation in Oklahoma (Potawatomi Reservation[1]). For the reasons discussed below, the Board affirms the Area Director's decision.

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[1] This appeal involves the relative rights of the Citizen Band and the Absentee-Shawnee Tribe in this reservation. The Board uses the term "Potawatomi Reservation" because that is the term which appears most often in the historical documents, although at least one document – the Sept. 18, 1891, Presidential Proclamation opening the reservation to settlement – refers to the reservation as the "Pottawatomie (and Absentee Shawnee) Reservation[ ]." 27 Stat. 989, 992.

The Board's use of the term "former" should not be taken to mean that the Board itself has concluded that the reservation has been terminated. The term merely reflects a common understanding. *See* discussion *infra*.

Procedural Background

On August 25, 1992, the Chairman of the Citizen Band wrote to the Area Director, stating that he had learned, that the Absentee-Shawnee Tribe had requested or would request BIA to take land in trust for it within the original boundaries of the Potawatomi Reservation. The Chairman stated that the Citizen Band was opposed to any such trust acquisitions for the Absentee-Shawnee Tribe. He requested that the Area Director respond to the Citizen Band's objections and that he articulate BIA policy concerning the matter.

The Area Director responded on September 17, 1992. He acknowledged that, under 25 CFR 151.8, the consent of the governing tribe of a reservation must be obtained before land within the reservation may be acquired in trust for another tribe.[2] However, he also stated: "[W]e believe the Citizen Band of Potawatomi Indians and the Absentee-Shawnee Indian Tribe of Oklahoma share a common former reservation area for purposes of fee simple acquisitions, and neither are required to secure non-member consents required by 25 Code of Federal Regulations, 151.8" (Area Director's Sept. 17, 1992, Letter

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[2] 25 CFR 151.8 provides:

"An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired."

at 2). In support of his statement concerning a shared reservation, the Area Director stated:

> By Act of Congress approved May 23, 1872 (17 Stat., 159), titled Chap. CCVI. – An Act to provide Homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory, the Secretary of the Interior was directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, was to be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band and to each Absentee Shawnee Indian. The above specifically provided the Absentee Shawnee and Pottawatomie citizen band certificates include the same provisions.
>
> In the different pieces of legislation researched, a number of designations were given the thirty mile square tract lying west of the Seminole reservation in the Indian Territory: "lands selected for the Pottawatomie Indians," "Pottawatomie (and Absentee Shawnee) Reservations," "Pottawatomie Reservation," however, we do not believe any can be construed to be a declaration establishing a former reservation area solely for the Citizen Band Potawatomi Indian Tribe of Oklahoma. Both tribes occupied the area on the same terms prior to March 3, 1891, wherein the Citizen Band of Pottawatomie Indians of the Indian Territory and the Absentee Shawnee Indians of the Indian Territory simultaneously ceded and opened to public settlement lands included in "Schedule of lands within the Sac and Fox, Iowa, Pottawatomie

(and Absentee Shawnee) Reservations, in Oklahoma Territory."

Id. at 1-2. The Area Director's letter did not include appeal instructions.

On October 30, 1992, the Citizen Band filed suit in Federal district court, seeking a declaration that the Potawatomi Reservation is the reservation of the Citizen Band alone and that BIA is therefore required to obtain the consent of the Citizen Band before taking land within the reservation in trust for the Absentee-Shawnee Tribe. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, No. CIV-92-2161-R (W.D. Okla.).

The district court dismissed the Citizen Band's complaint on February 2, 1993, for failure to join an indispensable party, the Absentee-Shawnee Tribe. Although the Area Director had also sought dismissal on the grounds that the Citizen Band had failed to exhaust administrative remedies, the court did not reach that argument.

The Citizen Band appealed the dismissal. On February 25, 1994, the United States Court of Appeals for the Tenth Circuit, holding that the Absentee-Shawnee Tribe was not an indispensable party, reversed the district court's order of dismissal and remanded the matter for further proceedings. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292 (10th Cir. 1994).

Back in the district court, the parties argued the question of whether the Citizen Band was required to exhaust administrative remedies. On August 5, 1994, the court issued an order stating: "The Court reserves ruling on the motion to dismiss for failure to exhaust administrative remedies. The [Citizen Band] is to pursue the

administrative remedies (if any) from the September 17, 1992, letter from [the Area Director] to [the Citizen Band's] Chairman."

By letter of October 12, 1994, the Area Director informed the Citizen Band that it could appeal his September 17, 1992, letter to this Board.

The Citizen Band then filed a notice of appeal with the Board. Although the notice was filed more than 30 days after the Citizen Band received the Area Director's September 17, 1992, letter, the Board accepted the appeal as timely filed because the September 17, 1992, letter did not provide appeal information.[3]

The appeal was docketed on November 28, 1994. The Citizen Band and the Area Director filed briefs.

Although fully informed of these proceedings and, in particular, of its right to file a brief, the Absentee-Shawnee Tribe did not file a brief during the briefing period established in the notice of docketing for this appeal. Briefing was completed on February 20, 1995, when the Citizen Band filed its reply brief. On April 17, 1995, the

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[3] 25 CFR 2.7 provides:"(a) The official making a decision shall give all interested parties known to the decision maker written notice of the decision by personal delivery or mail."(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section"(c) All written decisions * * * shall include a statement that the decision maybe appealed pursuant to this part, identify the official to whom it maybe appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

Board received a motion from the Absentee-Shawnee Tribe, seeking to file a brief as *amicus curiae*. The Board denied the motion, noting, *inter alia*, that the Tribe failed to give any explanation for the extreme lateness of its request.[4]

Historical Background

By a treaty entered into on February 27, 1867, the Citizen Band agreed to move from Kansas to the "Indian country south of Kansas." Preamble, Treaty of Feb. 27, 1867, 15 Stat. 531, 535. It was agreed that if the location selected

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[4] In August 1994, the Governor of the Absentee-Shawnee Tribe wrote to the Area Director, objecting to the acquisition of land in trust for any tribe other than itself within the "former Absentee-Shawnee Tribal Reservation." The Area Director responded on Oct. 19, 1994, making, in essence, the same statements he made in his Sept. 17, 1992, letter to the Chairman of the Citizen Band. The Oct. 19, 1994, letter included a statement informing the Absentee-Shawnee Tribe that it could appeal the letter to this Board. The Tribe did not appeal.The Absentee-Shawnee Tribe did not participate in the Federal court proceedings at any stage and has made only a belated and half-hearted attempt to participate in the present appeal. In failing to pursue its right to appeal and/or to participate in any of these several proceedings, the Tribe has demonstrated a puzzling lack of interest in a matter that would appear, to be of vital concern to it. Even so, the Board is not free to disregard the rights of the Absentee-Shawnee Tribe. The Department of the Interior, including this Board, bears a trust responsibility toward both the Citizen Band and the Absentee-Shawnee Tribe. In the context of this appeal, the trust responsibility obligates the Board to consider the rights of both tribes, regardless of their participation, or lack thereof, in this appeal.

> shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation.

Id. at Art. I. In accordance with the treaty, a tract of land was selected by the Citizen Band in February 1870 and approved by the Secretary on November 9, 1870. The tract comprised approximately 575,877 acres, of which about two-fifths had been acquired by the Government from the Creek Nation and about three-fifths from the Seminole Nation.[5] *Citizen Band of Potawatomi Indians of Oklahoma v. United States*, Findings of Fact in Docket 96, 6 Ind. Cl. Comm. 646, 650-51 (1958).

> The so-called Absentee Shawnees had separated from the body of the Shawnee Nation during the early 1840's and had settled at the time within the tract selected in 1870 by the Potawatomies. * * * They remained loyal to the Union during the Civil War and suffered severe losses of livestock and crops because of their loyalty and were driven from Oklahoma. However, by 1870, they * * * had moved back to their homes on the tract which was a portion of the tract selected as a reservation for the Citizen Band * * * .

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[5] See Treaty with the Creek Nation, June 14, 1866, 14 Stat. 785; Treaty with the Seminole Nation, Mar. 21, 1866, 14 Stat. 755.

> In February 1872, the Absentee Shawnee addressed a petition to the President * * * praying that the President give them title to a portion of the land on the Potawatomie reservation * * * upon which lands they had made their homes and had constructed valuable improvements over a period of many years.
>
> [The petition was sent forward by BIA officials with recommendations for approval. The BIA Superintendent] *reported that the Potawatomi had expressed a willingness not to disturb the Absentee Shawnee, but had asked that their reservation be extended westward so as to include an additional equivalent area.* [Emphasis in original.]

Id. at 651-52.

The Absentee Shawnee petition was brought to the attention of Congress, evidently by the Secretary of the Interior, *Id.* at 652. At about the same time, the Secretary requested that legislation be enacted to provide for allotments to members of the Citizen Band.[6] In evident response to these requests, Congress enacted the Act of May 23, 1872, 17 Stat. 159 (1872 Act), providing for allotments to Citizen Band members and Absentee Shawnees within the Potawatomi Reservation. Section 1 of the Act

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[6] Mar. 15, 1872, Letter from the Secretary to the Speaker of the House of Representatives, reprinted in H.R. Exec. Doc. No. 203, 42d Cong., 2d Sess. (1872). The Secretary stated that the reservation lands could not be conveyed to the Citizen Band as contemplated in the 1867 treaty because all Potawatomis had become citizens and the Potawatomi Nation was deemed extinct. Therefore, he stated, legislation was necessary "in order that justice maybe done to the Pottawatomis who have removed to this land" (H.R. Exec. Doc. No. 203 at 4).

provided for allotments to members of the Citizen Band. Allotments to heads of families and adults were to include not more than one-quarter section, and those to minors not more than 80 acres. Allotments were to be made to those members who had "resided or shall hereafter reside three years continuously on such reservation" and were to be paid for, either directly or by the allottees or from funds held by the United States for the Citizen Band.

Section 2 of the 1872 Act provided for allotments within the Potawatomi Reservation to be made to "any Indian of pure or mixed blood of the Absentee Shawnees, being a head of a family, or a person over twenty-one years of age, [who] has resided, continuously, for the term of three years within [the reservation], and has made substantial improvements thereon." Each such Absentee Shawnee adult was to be allotted 80 acres, with an additional 20 acres for each child under 21. There was no provision requiring the Absentee Shawnees to pay for their allotments.

Only 11 Citizen Band members paid for and received allotments under the 1872 Act. No Absentee Shawnees were allotted under that Act. 6 Ind. Cl. Comm. at 653.[7]

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[7] *See also* May 17, 1887, Letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, *reprinted in* "Letter from the Secretary of the Interior, transmitting, In response to resolution of February 14, 1891, information relative to instructions touching allotments of land on the Pottawatomi Reservation," S. Exec. Doc. No. 64, 51st Cong., 2d Sess. (1891) at 2-3. The Commissioner's 1887 letter stated that, in 1875, 131 allotments had been approved for members of the Citizen Band and 327 for Absentee Shawnees.

On February 8, 1887, Congress enacted the General Allotment Act, 24 Stat. 388, *as amended*, 25 U.S.C. § 331 (1994).[8] On May 23, 1887, the Secretary of the Interior determined that allotments within the Potawatomi Reservation could be made to Citizen Band members and Absentee Shawnees under the General Allotment Act, S. Exec. Doc. No. 64 at 5-6. The President approved the

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The letter also indicated, however, that only 11 allotment certificates were actually issued. Those were issued in 1884 and 1885 to the Citizen Band members who had paid for their allotments.

[8] All further references to the *United States Code* are to the 1994 edition. As originally enacted, section 1 of the General Allotment Act, provided: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon."Appellant objects to consideration of any legislation other than the 1872 Act on the grounds that it is "new evidence" which was not timely made a part of the record (Citizen Band's Reply Brief at 3). 43 CFR 4.24(b) authorizes the Board to take official notice "of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice." Accordingly, the Board can, and will, consider all relevant statutes, legislative history, and public records of the Department, regardless of whether those materials were included in the administrative record prepared by BIA or whether they were cited by any party to the appeal.

Secretary's determination on May 24, 1887. *Id.* at 6. Thereafter, allotments were made to both Citizen Band members and Absentee Shawnees under the General Allotment Act.

The Act of Mar. 3, 1891, 26 Stat. 989 (1891 Act), confirmed a June 25, 1890, agreement with the Citizen Band, 26 Stat. 1016, and a June 26, 1890, agreement with the Absentee Shawnee Indians, 26 Stat. 1019, both providing for cession of all lands within the Potawatomi Reservation. In Article II of each agreement, the allotments made under the General Allotment Act were confirmed, and further provisions concerning allotment were set out. In Article IV of each agreement, the United States agreed to make monetary payments ($160,000 to the Citizen Band and $65,000 to the Absentee Shawnees) "for making homes and other improvements on the(ir) said allotments." In both cases, the payments were to be made per capita.[9]

The land ceded under the two agreements was opened to non-Indian settlement by Presidential Proclamation of Sept. 18, 1891, 27 Stat. 989, 990. In Indian Claims Commission Docket 96, the Citizen Band sought compensation for lands in the Potawatomi Reservation,

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[9] Article III of the Citizen Band agreement stated that 1400 Citizen Band members had been determined to be entitled to take allotments and that, should more than that number receive allotments, one dollar per acre of each allotment in excess of 1,400 would be deducted from the sum to be paid the Citizen Band under Article IV.

Article III of the Absentee Shawnee agreement contained a similar provision, except that the total number of allotments to Absentee Shawnees was stated to be 650.

including the lands allotted to Absentee Shawnees. The United States contended, *inter alia*, that the Citizen Band had never become entitled to, or had waived its right to, the lands allotted to the Absentee Shawnees. The Commission rejected that argument 6 Ind. Cl. Comm. at 663-64. It continued:

> It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not "locations made for them" by the Government. They were, as defendant [*i.e.*, the United States] states, "in the nature of squatters" * * * whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive [sic, probably should be "executive"] branch of the Government or by the Citizen Band. * * *
>
> The agreement of June 26, 1890 (26 Stat. 1019) wherein the Absentee Shawnee ceded the entire Oklahoma Reservation for a consideration of $65,000 and confirmation of their allotments cannot be construed as a ratification of a "reservation title" or of a use and occupancy title from time immemorial. Their possessory right was in the nature of a tenancy at will, they were in "peaceable possession" after the arrival of the Citizen Band only because the Citizen Band expressed a willingness not to disturb them provided the Government extended the Citizen Band's reservation to include an equivalent area westward.

6 Ind. Cl. Comm. at 664-65. The Commission held that the Citizen Band had "established a compensable right and interest to the extent of full ownership in and to the

575,877 acres of land known as the Oklahoma Reservation" and that the Band was "entitled to claim additional compensation for 362,832.22 acres of said Oklahoma Reservation land, being the excess over allotments to [its] members." *Id.* at 665.

On August 27, 1968, the Commission determined that the Citizen Band was entitled to recover $797,508.99 for the taking. 19 Ind. Cl. Comm. 368, 384 (1968). The funds to pay this award were appropriated by the Act of July 22, 1969, 83 Stat. 49, 62, and use of the funds was authorized by the Act of Sept. 16, 1970, 84 Stat. 838.

Standard of Review

The regulations in 25 CFR Part 151 concern the manner in which the Secretary is to exercise his authority to acquire land in trust for Indians and Indian tribes. The Secretary's statutory trust acquisition authority is broadly discretionary. *See* 25 U.S.C. § 465.[10] *See also, e.g., Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied* 475 U.S. 1011 (1986). However, in promulgating the regulations in 25 CFR Part 151, BIA has imposed some limitations on the exercise of its discretion. It has, for instance, distinguished between on-reservation and off-reservation trust acquisitions and, as relevant

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[10] 25 U.S.C. § 465 provides: "The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations * * * for the purpose of providing lands for Indians."

here, has given tribes veto power over certain acquisitions within their reservations, when the acquisitions are sought by other tribes or members of other tribes.

25 CFR 151.2(f) defines "Indian reservation" for purposes of trust acquisitions under Part 151:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.

The last part of this definition is relevant here. Thus, for purposes of trust land acquisitions under Part 151, the "former reservation(s)" of the Citizen Band and/or the Absentee-Shawnee Tribe are to be "defined by the Secretary." The regulation sets no standards for the exercise of the Secretary's authority to define a former reservation. Neither the Citizen Band or the Area Director specifically addresses the scope of the Secretary's authority in this regard.[11]

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[11] The Citizen Band's briefs evidence some confusion between the Secretary's authority to "define" a former reservation under 25 CFR 151.2(f) and any authority the Secretary may have to "proclaim" or "create" Indian reservations. The Secretary has authority under 25 U.S.C. § 467 to proclaim Indian reservations with respect to lands acquired

[1] It is perhaps arguable that BIA has some leeway in defining a former reservation for purposes of the discretionary land acquisition authority and that the Board therefore has limited authority to review the BIA decision in light of 43 CFR 4.330(b)(2). However, in the one case in which it has addressed BIA's authority under subsection 151.2(f), the Board recognized, although it did not discuss at length, the need for legal and historical underpinnings for BIA's definitions of former reservations under this subsection. *Kialegee Tribal Town v. Muskogee Area Director*, 19 IBIA 296 (1991). The Board concludes that the better view is that BIA's determination concerning former reservation status is a legal conclusion subject to *de novo* review by the Board. *Cf. Baker v. Muskogee Area Director*, 19 IBIA 164, 169, 98 I.D. 5, 7 (1991) (A BIA conclusion concerning statutory authority for trust acquisitions is a legal conclusion subject to full Board review).

Discussion and Conclusions

On appeal to the Board, the Citizen Band contends that the Indian Claims Commission decision in Docket 96

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in trust under 25 U.S.C. § 465. That authority, however, does not apply to lands acquired for Indian tribes in Oklahoma. See 25 U.S.C. § 473. The Board is not aware of any other statutory authority under which the secretary may proclaim Indian reservations.

However, the Secretary does not, by "defining" a former reservation under 25 CFR 151.2(f), purport to proclaim or create a true reservation or to vest the defined area with the attributes of reservation status for jurisdictional purposes. Rather, the Secretary simply describes areas with respect to which the reservation-based provisions of 25 CFR Part 151 will apply.

is controlling on the question of present-day rights in the Potawatomi Reservation for purposes of 25 CFR Part 151. The Area Director counters that the Commission's decision is not controlling here because the Commission's jurisdiction was limited to the award of money damages and did not include the authority to quiet title to Indian land or to determine reservation status.

The Citizen Band appears to be contending that the issue in this case is the same, or similar to, the issue considered by the Indian Claims Commission. That is clearly not the case. The holding in the first phase of Docket 96 was, as stated above, that the Citizen Band had established "a compensable right and interest to the extent of full ownership in and to the 575,877 acres of land known as the Oklahoma Reservation." 6 Ind. Cl. Comm. at 665. In the second phase of the proceedings, in which the issues of valuation and consideration were considered, the Commission accepted June 25, 1890, as the valuation date.[12] This date is, in essence, the date upon which the Citizen Band was deemed to have been deprived of the lands for which it was to be compensated, *i.e.*, all lands of the reservation except the lands allotted to its own members. Thus, the effect of the Commission's decision was to determine ownership of the reservation lands on June 25, 1890, immediately prior to the taking. The fact that the Citizen Band owned these lands on June 25, 1890, however, is not determinative of rights in the

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[12] This date was arrived at by stipulation. 14 Ind. Cl. Comm. 570, 586 (1964). As indicated above, June 25, 1890, was the date of the agreement between the Citizen Band and the United States, which was ratified by the 1891 Act.

reservation after that date. For one thing, some of the lands for which the Commission awarded compensation to the Citizen Band were the lands allotted to Absentee Shawnees. Thus, one obvious question which follows from the Commission's decision is whether, by taking those lands from the Citizen Band and allotting them to Absentee Shawnees, the United States gave the Absentee-Shawnee Tribe a right in the reservation, and/or recognized the Absentee-Shawnee Tribe as having a right in the reservation.

The difference between the issue addressed by the Indian Claims Commission in Docket 96 and the issue presented here is well illustrated by reference to the history of the Wind River Reservation in Wyoming, which bears a resemblance to the history of the Potawatomi Reservation by treaty of July 3, 1868, 15 Stat. 673, a reservation, now known as the Wind River Reservation, was "set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians."[13]

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[13] Art. II of the July 3, 1868, treaty provided:

"The United States further agrees that [the reservation] shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for use of said Indians.

However, in 1878, without the consent of the Shoshone Tribe, a band of Arapahoes was brought to the reservation by military escort and settled there. Thereafter, the Federal Government, including Congress, treated the reservation as jointly owned by the two tribes, despite the protests of the Shoshone Tribe. In 1897 and 1905, Congress ratified agreements with both tribes, providing for the cession of land within the reservation and for allotments to members of both tribes. Following continued protests by the Shoshone Tribe, Congress in 1927 enacted a statute enabling the Shoshone Tribe to sue in the Court of Claims for claims arising out of the 1868 treaty and/or subsequent agreements.[14] Ultimately, it was determined that the United States had taken a half interest in the lands of the reservation in 1878, when the Arapahoes were first settled there. The Shoshone Tribe was determined to be entitled to compensation for that taking. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937).

The Supreme Court in *Shoshone Tribe of Indians* recognized that the Shoshone Tribe was the sole beneficial owner of the Wind River Reservation prior to 1878. It also recognized, however, that the Tribe was deprived of its sole ownership in 1878. Since that time, the United States has recognized the Shoshone Tribe and the Arapahoe Tribe as sharing both the ownership of tribal lands within

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[14] Prior to 1946, when the Indian Claims Commission was established, special jurisdictional statutes were enacted on a case-by-case basis, to permit Indian tribes to bring claims against the United States in the Court of Claims. *See generally* F. Cohen, *Handbook of Federal Indian Law* (1941) at 373-78.

the reservation and the right to govern the reservation. This recognition of shared rights in the reservation continues to the present day. *See, e.g.*, 25 U.S.C. § 611-613; *Shoshone and Arapahoe Indian Tribes v. Hodel*, 903 F.2d 784 (10th Cir. 1990); *Knight v. Shoshone and Arapahoe Tribes*, 670 F.2d 900 (10th Cir. 1982).

The Indian Claims Commission's decision in Docket 96 is binding on the Board as to the fact of a taking from the Citizen Band and as to the date of taking. While it is clearly relevant to this case, that decision does not dictate the resolution of the issue here.

The Citizen Band also suggests, although it does not explicitly contend, that the Board's decision here is controlled by certain statements made in the Tenth Circuit decision in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier, supra*. The court of appeals stated:

> On appeal, the BIA offers a copy of the 1872 Act giving the Secretary of the Interior the power to grant allotments to members of the Absentee-Shawnee tribe who fulfill certain requirements. This evidence is irrelevant as well as untimely.
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> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. § 151.8. It merely grants the Secretary of the Interior the power to allot land to *individual* Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a *tribe*. Moreover, as the Potawatomi tribe correctly point[s] out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will

> evaluate their applications as they would Potawatomi applications. * * * Until the BIA actually approves an individual Absentee-Shawnee application, this "interest" is inchoate. [Emphasis in original.]

17 F.3d at 1294.

The Area Director argues that the court of appeals' discussion is addressed solely to the issue before it, *i.e.*, whether the Absentee-Shawnee Tribe was an indispensable party. Thus, he contends, "[t]he decision in no way addresses or even reaches the issue of whether the Absentee Shawnee [Tribe] has a former reservation interest in the tract equivalent to that of the Citizen Band" (Area Director's Answer Brief at 14-15). The Citizen Band acknowledges that the Tenth Circuit decision "only resolved the issue of indispensable party" but contends that "an administrative body would be ill-served by taking the BIA advice to ignore significant *dicta* from a circuit court of appeals decision relating to the same question" (Citizen Band's Reply Brief at 15).

The district court, following remand from the court of appeals, also suggested that the Tenth Circuit *dicta* be taken into account in any administrative review. However, the fact that the district court ordered the Citizen Band to pursue administrative remedies indicates that the court did not consider this Department to be precluded from considering the substantive issue raised by the Citizen Band.[15]

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[15] Addressing counsel for the Citizen Band, the district court stated: "[It] looks to me like they [the administrative review forum] are the exact appropriate people to listen to this

The issue before the court of appeals was the procedural issue of the Absentee-Shawnee Tribe's status as an indispensable party, without whom the proceedings in Federal court could not continue. In order to address that issue, the court was compelled to address the merits of this matter to some extent. However, the court's discussion of the merits was quite limited. Of the several enactments affecting the Potawatomi Reservation, it mentioned only one, the 1872 Act. Further, in finding that the Government had failed to show that the Absentee-Shawnee Tribe was an indispensable party, the court specifically based its conclusion upon "the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land," 17 F.3d at 1294, rather than upon the existence of evidence showing that the Absentee-Shawnee Tribe did not possess such an interest. Under these circumstances, the Board does not believe that the court of appeals intended, by its brief discussion of the merits of this matter, to preclude full consideration of the merits by the Department of the Interior upon a possible remand to exhaust administrative remedies.[16] Therefore, the Board concludes that it may consider the merits here.

[the Citizen Band's argument on the merits]. You may well be right. And the 10th Circuit has said you're probably right. I would think they would take some guidance from the 10th Circuit opinion" (Transcript of Hearing on Motion to Dismiss, July 28, 1994, at 6).

[16] Indeed, it is a well-established principle of administrative law that Federal courts show deference to the interpretation of statutes made by agencies charged with the administration of those statutes. *E.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). This principle contemplates that the agencies will

The history of the Potawatomi Reservation – in particular, the cession agreements, allotments to tribal members, and opening to non-Indian settlement – resembles the histories of other reservations throughout the country, many of which have been the subject of Supreme Court decisions concerning their present-day status as Indian reservations. *See, e.g., Hagen v. Utah*, 114 S. Ct. 958 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984). Typically, these cases revolve around statutes which, like the 1891 Act in this case, provided for allotments to tribal members and opened the "surplus" lands of the reservation to settlement by non-Indians. The usual question is whether a particular statute diminished or "disestablished" a reservation. The Supreme Court's decisions in these cases employ an analytical framework which is also useful here, despite the different issue in this case, because the same kind of statute is pivotal to the decision and because an important question here is whether, or to what extent, the 1891 Act diminished the rights of the Citizen Band in the Potawatomi Reservation.[17] In

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exercise their particular expertise in interpreting their own statutes and regulations in order to render final agency decisions.

In this case, the 19th century treaties and statutes concerning the Potawatomi Reservation were administered by the Department of the Interior. Moreover, in the context of the issue in this appeal, those treaties and statutes are to be construed for the purpose of implementing the Secretary's current statutory authority to take land in trust for Indians.

[17] As the last major congressional enactment concerning the Potawatomi Reservation, the 1891 Act is critical to the determination of its present-day status. This is readily apparent both as a matter of history and by reference to the date of taking

addition to the reservation status cases, the Supreme Court's decision in *Shoshone Tribe of Indians* is clearly relevant here, given the historical similarities of the situation addressed therein to that in the present case.

Guided by the principles developed in these Supreme Court decisions, the Board proceeds to the question of whether the present-day Potawatomi Reservation is the reservation (or former reservation) of the Citizen Band alone or whether it is the reservation of both the Citizen Band and the Absentee-Shawnee Tribe.

In the reservation status cases, the Supreme Court has made it clear that its task is to determine the intent of Congress. For that purpose, it has found the language of the particular statute at issue to be the most probative evidence. *E.g., Hagen,* 114 S. Ct. at 965; *Solem,* 465 U.S. at 470. So too, in *Shoshone Tribe of Indians,* among evidence of ratification of a taking, the Court found "most important of all, the statutes * * * recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits." 299 U.S. at 495.

The language of the 1891 Act indicates that Congress deemed the Absentee Shawnees to have an interest in the

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established in Indian Claims Commission Docket 96, *i.e.,* June 25, 1890, the date of the Citizen Band agreement ratified by the 1891 Act.

Potawatomi Reservation. In Article I of the ratified agreement with the Absentee Shawnees, the Absentee Shawnees ceded to the United States all "their claim, title and interest of every kind and character in and to" the lands within the reservation. Article II confirmed the allotments made to Absentee Shawnees under the General Allotment Act.[18] Article IV provided:

> It is further agreed, as a further and only additional consideration for such relinquishment of all title, claim and interest of every kind and character, in and to such lands, the United States will pay to said Absentee Shawnees in said tract of country * * * the sum of sixty-five thousand ($65,000) dollars for making homes and other improvements on their said allotments.

The legislative history is consistent with the language of the statute. The House report states:

> The bill provides for the ratification of two agreements entered into on behalf of the United States by the Cherokee Commissioners, the first on the 25th day of June, 1890, with the Citizen Band of Pottawatomie Indians; and the second

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[18] By authorizing allotments to Absentee Shawnees under the General Allotment Act, the Secretary of the Interior and the President had recognized some rights in the Absentee Shawnees to lands in the Potawatomi Reservation, because the General Allotment Act clearly contemplated that allotments within a reservation would be made to members of the tribes for whom the reservations had been created. *See* note 8, *supra*. To the extent the Secretary and the President might have erred in their legal conclusion, however, Congress cured the error by confirming the allotments.

> on the 26th day of June with the Absentee Shawnee Indians, all residing on the Pottawatomie Reservation, in Oklahoma Territory, *for the relinquishment of their respective rights upon and to said reservation* [Emphasis added]."

H.R. Rep. No. 3481, 51st Cong., 2d Sess. 1 (1891). The same report notes, at pages 2-3, that the Absentee Shawnees "were not there [*i.e.*, on the Potawatomi Reservation] by any treaty or Executive order, but the Government has long known of their presence there," and that "[t]he Commissioners agreed that they should be paid for the relinquishment of their claims, after taking allotments, $65,000."

In *Shoshone Tribe of Indians*, the Supreme Court described an agreement with the Shoshones and Arapahoes, analogous to the agreements ratified in the 1891 Act in this case, as one "with clear recognition of the occupancy of the Arapahoes and their equal interest in the land." 299 U.S. at 489. Moreover, as noted above, the Court found that the statutes at issue in that case "recogniz[ed] the Arapahoes equally with the Shoshones as occupants of the land, accept[ed] their deeds of cession, assign[ed] to the tribes equally the privilege of new allotments, and devot[ed] to the two equally the award of future benefits." *Id.* at 495.

Here also, Congress accepted a deed of cession from the Absentee Shawnees and authorized allotments to them. While it perhaps did not recognize *equal* rights in the two tribes,[19] there is no doubt that Congress, despite its awareness that the Absentee Shawnees lacked formal

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[19] *See* discussion, *infra*.

permission to occupy the reservation, still believed that they had some rights in the reservation.

The Board finds that the language of the 1891 Act, together with congressional statements in the legislative history, support a conclusion that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation.

In the reservation status cases, the Supreme Court has also taken into consideration the circumstances and events surrounding enactment of a statute opening a reservation to settlement. In *Solem*, the Court stated:

> When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

465 U.S. at 471. *See also Hagen*, 114 S. Ct. at 965.

Accordingly, the Board considers the circumstances surrounding enactment of the 1891 Act. It is evident from various Department of the Interior documents that Departmental officials believed the Absentee Shawnees had some rights in the Potawatomi Reservation. Congress was made aware of those views through the Secretary's

transmittals of several documents during the period immediately preceding enactment of the 1891 Act.[20] Congress was also aware that the Commissioners who negotiated the cession agreement with the Absentee Shawnees in 1890 held a similar belief. *See* H.R. Rep. No. 3481, *supra*. Further, Congress must be deemed to have

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[20] The Interior view is illustrated in the documents reprinted in S. Exec. Doc. 64, *supra*, a compilation furnished to Congress on Feb. 26, 1891. For instance, it is noted therein that the Absentee Shawnees had occupied some of the Potawatomi Reservation lands before the Citizen Band arrived and that "a feeling of uneasiness and insecurity has existed among [the Absentee Shawnees] since the settlement of the Pottawatomies upon the lands exclusively occupied by the former for more than 30 years" (S. Exec. Doc. 64 at 3). *See also id.* at 10. The documents also reflect the fact that, at the request of the Absentee Shawnees, the Department had undertaken to allot members of the two tribes in different parts of the reservation, in essence allowing the Absentee Shawnees to control "their" part of the reservation. *Id.* at 3-4, 7, 9-10, 13-14, 16-17. (The practice of geographically restricting Citizen Band allotments was disapproved in the 1891 Act. *See* 1891 Act, sec. 11, 26 Stat. 1021; H.R. Rep. No. 3481, 51st Cong., 2d. Sess. 2 (1891).)

Another document submitted to Congress the year before the 1891 Act was enacted was a general legal discussion of the Indians in Indian Territory. "Letter from the Secretary of the Interior, transmitting, in response to Senate resolution of March 10, 1890, the compilation concerning the legal status of the Indians in Indian Territory," S. Exec. Doc. No. 78, 51st Cong., 1st Sess. (1890). Although less detailed, this document reflects the same point of view as does S. Exec. Doc. No. 64. *See, e.g.*, page 20: "Under date of May 23, 1887, the Secretary of the Interior decided that both the Citizen Band of Pottawatomies and the Absentee Shawnees having been located on *their* reservation under the act of 1872, and being so located, they come within the provisions of the [General Allotment Act]." (Emphasis added.)

been aware of the legislation it had enacted 20 years earlier, in which it had authorized allotments to Absentee Shawnees within the Potawatomi Reservation.

The Board finds that the circumstances surrounding enactment of the 1891 Act are consistent with the language of the Act itself and, again, support a conclusion that Congress intended to recognize some rights of the Absentee Shawnees in the Potawatomi Reservation.

The next question is whether there has been any change in Congress' view of the Potawatomi Reservation since 1891.

In the reservation status cases, the Supreme Court has given some consideration to the history of a reservation subsequent to the statute opening it to settlement. In *Solem*, after discussing the weight given to events contemporaneous with the opening statutes, the Court continued:

> To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.

465 U.S. at 471.

Here, subsequent events might be examined for the purpose of shedding further light upon Congress' intent in 1891 and also for the purpose of determining whether

Congress has taken any action to alter the result it evidently intended in 1891.

This effort is hampered to some extent by the fact that Indian reservations in Oklahoma have generally been presumed, whether rightly or wrongly, to have been terminated by the statutes which opened them to non-Indian settlement. *See, e.g., Cohen's Handbook of Federal Indian Law* 775-76 (1982 ed.).[21] Presumably, it is because many of the usual reservation-based issues have simply not arisen with respect to the Potawatomi Reservation that there has been little need to address the question of rights in the reservation.

Congress has, however, legislated on three occasions concerning certain lands within the Potawatomi Reservation. In 1960, it authorized the conveyance of a 57.99-acre tract to the Citizen Band "subject to the right of the Absentee Shawnee of Oklahoma, Sac and Fox of Oklahoma, Kickapoo of Oklahoma, and Iowa Tribe of Oklahoma to use the Potawatomi community house that

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[21] With respect to most of the original reservations in Oklahoma, there have been no definitive adjudications concerning their present-day status. The Board is not aware of any such adjudication concerning the Potawatomi Reservation.

In recent years, the Federal courts have come to regard tribal trust lands in Oklahoma as "informal" reservations, and thus "Indian country" for jurisdictional purposes. *E.g., Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214, 2217 n.2 (1995); *Oklahoma Tax Commission v. Sac & Fox Nation*, 113 S. Ct. 1985, 1991 (1993); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980). These decisions proceed from the premise, spoken or unspoken, that the original reservations are extinct.

maybe constructed and maintained thereon." Act of Sept. 13, 1960, 74 Stat. 903. Prior to the conveyance, the land had been used by the Government as an Indian school farm.

In 1964, Congress authorized the conveyance of six tracts, totalling approximately 222 acres, to the Citizen Band, and one tract, containing 33.23 acres, to the Absentee-Shawnee Tribe. Act of Aug. 11, 1964, 78 Stat. 292. The seven tracts had been part of the Shawnee Indian School and Agency Reserve.

The Senate and House reports on the 1960 and 1964 statutes all stated that the land conveyed was "part of a large area ceded to the United States by the Citizen Band and the Absentee Shawnee Indians in an agreement ratified by the act of March 3, 1891 (26 Stat. 1016)" (S. Rep. No. 1605, 86th Cong., 2d Sess. 2 (1960). *Accord* H.R. Rep. No. 1661, 86th Cong., 2d Sess. 2 (1960); S. Rep. No. 1255, 88th Cong., 2d Sess. 1 (1964)); H.R. Rep. No. 1490, 88th Cong., 2d Sess. 2 (1964).

Both the 1960 and 1964 Acts authorized conveyance of the subject tracts to the tribes in fee status. In 1975, Congress authorized the tribes to reconvey the tracts to the United States, to be held in trust for the tribes. Act of Jan. 2, 1975, P.L. 93.590, 88 Stat. 1922 (Absentee-Shawnee Tribe); Act of Jan. 2, 1975, P.L. 93-591, 88 Stat. 1922 (Citizen Band).

In conveying lands within the former reservation to both tribes, and in referencing the 1890 cessions by both tribes, Congress acted consistently with the 1891 Act,

recognizing both tribes as having rights in the reservation.[22]

The Board is not aware of any other 20th century legislation specifically dealing with lands or rights in the Potawatomi Reservation.

With respect to BIA's practice in this century, the Citizen Band and the Area Director agree that BIA has consistently treated the area as the shared former reservation of the two tribes. The Citizen Band, in fact, specifically complains of this practice on the part of BIA. *See* Citizen Band's Opening Brief at 9; Reply Brief at 9.

As evidence of BIA's present position, the Area Director cites the Absentee-Shawnee Tribe's Self-Governance Compact and its Constitution. The Self-Governance Compact was signed by the Tribe's Governor and the Assistant Secretary – Indian Affairs on September 25, 1990. It includes funding for, *inter alia*, law enforcement and tribal courts, thus evidencing BIA recognition of the

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[22] There is, of course, a substantial difference in the amount of land conveyed to the two tribes. In Apr. 1, 1964, letters reprinted in S. Rep. No. 1255 and H.R. Rep. No. 1490, the Assistant Secretary of the Interior indicated that the division of land in the 1964 statute was made pursuant to an agreement between the tribes:

> "This bill is the result of a great deal of planning between the two tribes regarding the use of lands that are no longer needed by the Federal Government for the purposes for which they were reserved. The tribes have agreed to the division of the lands as indicated in the bill. Each tribe will receive land for which plans have been made as to its best ultimate use."

(S. Rep. No. 1255 at 3; H.R. Rep. No. 1490 at 3-4).

Absentee-Shawnee Tribe's authority to exercise some degree of territorial jurisdiction. The present Absentee-Shawnee Constitution was approved by the Acting Deputy Commissioner of Indian Affairs on February 4, 1977. An amendment to the jurisdictional provision was approved by the Area Director on April 13, 1988.[23] BIA's

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[23] The 1977 Constitution provided, in Article II, Jurisdiction:

> "The jurisdiction of the Absentee-Shawnee Tribe shall extend to all tribally owned land and all restricted or trust land belonging to tribal members within the boundary of the reservation established by Agreement dated June 26, 1890, and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land, or interest in land, which may be subsequently acquired."

As amended in 1988, Article II provides:

> "Section 1. The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma shall, consistent with applicable federal law, extend to all persons and to all real property, including lands and natural resources, and to all water and air space within the Indian Country, as defined in 18 U.S.C. § 1151 or its successor, over which the Absentee-Shawnee Tribe of Indians of Oklahoma has authority within the boundary of the tribal jurisdiction established by Agreement dated June 26, 1980 [sic] and ratified by the Act of March 3, 1891 (26 Stat. 1019), and such other land or interest in land, which may be subsequently acquired.
>
> "Section 2. The jurisdiction and governmental powers of the Absentee-Shawnee Tribe of Indians of Oklahoma shall also, consistent with the applicable federal law, extend outside the exterior boundaries of the Absentee-Shawnee Tribe of Indians of Oklahoma.

approval of these documents is further evidence that BIA has recognized some Absentee-Shawnee territorial jurisdiction within the original reservation boundaries. The Citizen Band concedes that the lands referred to in the Absentee-Shawnee Constitution are "areas of land within the Potawatomi Reservation where the Absentee-Shawnee arguably do have some tribal jurisdiction, to-wit the lands presently held in trust for the Absentee-Shawnee or lands previously allotted to individual Absentee-Shawnee members" (Citizen Band's Reply Brief at 5). It appears likely that the territorial jurisdiction presently exercised by the Absentee-Shawnee Tribe is consistent with the "Indian country" jurisdiction recognized by the Federal courts. *See* note 21, *supra*. The Citizen Band does not discuss its own territorial jurisdiction or the extent to which BIA has recognized that jurisdiction. Presumably, however, the Citizen Band exercises jurisdiction over present-day Citizen Band "Indian country." *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, supra.* In any event, the Citizen Band does not contend that it retains territorial jurisdiction over the entire former Potawatomi Reservation.[24]

"Section 3. The exercise by the Tribe of its jurisdiction and governmental powers shall be incorporated in appropriate legislation enacted by the Tribe and embodied in a tribal code in order to promulgate procedural rules for a tribal judicial system, and to establish and provide for a tribal law enforcement agency, tribal regulatory bodies and other appropriate administrative agencies of the Tribe."

[24] In a sense, of course, the Citizen Band's contention that it has authority to veto Absentee-Shawnee land acquisitions under 25 CFR 151.8 is an assertion of territorial jurisdiction over

The Board finds, in light of the parties' general agreement on the point, that BIA has consistently treated the Potawatomi Reservation as the shared former reservation of the two tribes.

[2] The Board finds nothing in the history of the Potawatomi Reservation subsequent to 1891 which alters Congress' recognition in the 1891 Act of Absentee Shawnee rights in the Potawatomi Reservation. Accordingly, the Board finds that the Absentee-Shawnee Tribe has present-day rights in the Potawatomi Reservation which may be recognized by BIA for purposes of 25 CFR 151.8.

It is not clear that Congress intended in the 1891 Act to recognize precisely *equal* rights in the two tribes. Both the monetary payments to the two tribes ($160,000 to the Citizen Band and $65,000 to the Absentee Shawnees) and the number of allotments recognized for each tribe (1,400 for Citizen Band members and 650 for Absentee Shawnees) were substantially different. The difference in the number of allotments can undoubtedly be attributed to population differences between the two tribes. It is possible that the difference in the monetary payments can also be attributed in part to population differences, because the payments were to be made per capita, for the purpose of "making homes and other improvements on the said allotments." As noted above, the 1960 and 1964 statutes conveyed substantially different amounts of land to the two tribes. However, the differences, with respect to the lands conveyed in 1964, were explained in the legislative

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the entire former reservation. However, the Citizen Band makes no claim that it may exercise such governmental powers as law enforcement or taxation over the former reservation as a whole.

history as based upon an agreement between the two tribes, *see* note 22, *supra*, and thus may not represent any understanding on the part of Congress that the rights of the tribes were unequal.

The Board reaches no conclusion on this point because it finds it unnecessary to do so. Assuming *arguendo* that, at the present time, the Citizen Band has a greater interest in the reservation than does the Absentee-Shawnee Tribe, there is no obvious way for BIA to deal with that fact for purposes of trust acquisitions under 25 CFR Part 151, unless, perhaps, it is by some artificial geographic division of the reservation. In view of Congress' 1891 disapproval of BIA's attempts to divide the reservation, *see* note 20, *supra*, the Board finds that neither it nor BIA may now order such a division.[25]

In order to avoid future conflicts, the two tribes may wish to consider negotiating an agreement concerning trust acquisitions. However, absent such an agreement, the Board finds that it is reasonable for BIA to treat the entire former Potawatomi Reservation as the reservation of both tribes for purposes of 25 CFR Part 151.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior,

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[25] Practical considerations may also prevent such a division, if the present-day landholdings of the tribes and their members are intermingled.

43 CFR 4.1, the Area Director's September 17, 1992, decision is affirmed.

/s/ Anita Vogt
Anita Vogt
Administrative Judge

I concur:

/s/ Kathryn A. Lynn
Kathryn A. Lynn
Chief Administrative Judge

CITIZEN BAND **POTAWATOMI** INDIAN TRIBE OF OKLAHOMA, a federally recognized Indian Tribe, Plaintiff-Appellant,

v.

L.W. **COLLIER**, Jr., in his official capacity as the Area Director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, Defendant-Appellee.

No. 93-6042.
United States Court of Appeals,
Tenth Circuit.
Feb. 25, 1994.

Potawatomi tribe brought suit against Bureau of Indian Affairs (BIA) seeking declaration that BIA should obtain tribe's consent before granting any trusts of land on its reservation. BIA's motion to dismiss for failing to join Absentee-Shawnee tribe as necessary party was granted by the United States District Court for the Western District of Oklahoma, David L. Russell, J. Appeal was taken. The Court of Appeals, Paul J. Kelly, Jr., Circuit Judge, held that Shawnee tribe acquired no interest in land trusts on Potawatomi reservation under statute authorizing allotment of reservation land and, thus, Shawnee tribe was not indispensable party.

Reversed and remanded.

Michael Minnis (David McCullough with him on the brief), Michael Minnis & Associates, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Jacques B. Gelin, Attorney, Department of Justice (and Myles E. Flint, Acting Assistant Attorney General, Washington, D.C., Joe Heaton, United States Attorney,

and M. Kent Anderson, Assistant United States Attorney, Oklahoma City, Oklahoma, Edward J. Shawaker and Glen R. Goodsell, Attorneys, Department of Justice, Washington, D.C., and M. Sharon Blackwell and Keith S. Francis, Office of the Field Solicitor, Department of the Interior, Tulsa, Oklahoma, with him on the brief) for Defendant-Appellee.

Before KELLY and McKAY, Circuit Judges, and ROGERS, District Judge.*

PAUL KELLY, Jr., Circuit Judge.

Plaintiff-appellant Citizen Band Potawatomi Indian Tribe of Oklahoma appeals from dismissal of its suit against the Bureau of Indian Affairs for failure to join an indispensable party. Fed.R.Civ.P. 12(b)(7), 19. We have jurisdiction under 28 U.S.C. Sec. 1291 and we reverse.

Background

Pursuant to 25 U.S.C. Sec. 465, the Bureau of Indian Affairs (BIA) has the power to grant trusts of land to proper Indian applicants. An 1872 Act of Congress specifically grants power to the Secretary of the Interior to allot land within the Potawatomi reservation in Oklahoma to an individual Absentee-Shawnee who fulfills certain conditions. Act of May 23, 1872, ch. 206, 17 Stat. 159 (1872). According to 25 C.F.R. Sec. 151.8, however, the BIA may not grant lands comprising part of an Indian reservation without the consent of the Indian tribe that

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* The Honorable Richard D. Rogers, Senior United States District Judge for the District of Kansas, sitting by designation.

has jurisdiction over the affected reservation, unless the applicant tribe or individual Indian "already owns an undivided trust or restricted interest in the parcel of land to be acquired."

Upon learning of possible pending applications of the Absentee-Shawnee for land trusts on the Potawatomi reservation, the Potawatomi tribe wrote the BIA to inquire about the existence of any such applications. The BIA responded by neither affirming nor denying the existence of any applications and opined that, in any case, the Potawatomi and the Absentee-Shawnee "share a common former reservation area" and that the BIA therefore need not obtain the Potawatomis' consent to grant land trusts to the Absentee-Shawnee involving Potawatomi reservation land.

The Potawatomi tribe sued the BIA for declaratory relief, seeking a declaration that the BIA obtain its consent before granting any trusts of land on its reservation lands. When the Potawatomi learned that Absentee-Shawnee applications were in fact pending with the BIA, the Potawatomi tribe amended its complaint to include mandamus relief requiring the BIA to obtain its consent with regard to the pending applications. The BIA moved to dismiss the action under Rule 12(b)(7) for failure to join the Absentee-Shawnee tribe as a necessary party to the dispute, and alternatively on the grounds that the Potawatomi tribe had not exhausted its administrative remedies. The district court dismissed the action on the former ground, not reaching the latter.

Discussion

We review a Rule 12(b)(7) dismissal for abuse of discretion. *See Navajo Tribe of Indians v. New Mexico,* 809 F.2d 1455, 1471 (10th Cir.1987). The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence. *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank,* 659 F.2d 234, 242 (D.C.Cir.1981); *Martin v. Local 147, Int'l Bro. of Painters,* 775 F.Supp. 235, 236-37 (N.D.Ill.1991); *Ashley v. American Airlines, Inc.,* 738 F.Supp. 783, 788 (S.D.N.Y.1990). The proponent's burden can be satisfied by providing "affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *Martin,* 775 F.Supp. at 236 (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* Sec. 1359, at 427 (1990)).

In support of its 12(b)(7) motion, the BIA offered a letter from the Area Director of the BIA, defendant-appellee L.W. Collier Jr., stating the BIA's position that the Potawatomi tribe and the Absentee-Shawnee tribe "share a common former reservation." Aplt. Br. at 2. The BIA offered no other evidence of the Absentee-Shawnee's interest in the reservation lands. Standing alone, this is not sufficient to satisfy the BIA's burden of demonstrating the nature of the Absentee-Shawnee tribe's interest in the subject property. On appeal, the BIA offers a copy of the 1872 Act giving the Secretary of the Interior the power to grant allotments to members of the Absentee-Shawnee tribe who fulfill certain requirements. This evidence is irrelevant as well as untimely.

The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. Sec. 151.8. It merely grants the Secretary of the Interior the power to allot land to *individual* Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a *tribe*. Moreover, as the Potawatomi tribe correctly point out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will evaluate their applications as they would Potawatomi applications. This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. Until the BIA actually approves an individual Absentee-Shawnee application, this "interest" is inchoate.

In the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion under 12(b)(7). For this reason the district court abused its discretion in dismissing the action. Accordingly, the order of dismissal is REVERSED and the case is REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff, v. L.W. COLLIER, JR., in his official capacity as the area director of the Anadarko Area Office of the Bureau of Indian Affairs, Department of the Interior, Defendant.	)	CIV-92-2161-R (Filed Feb. 02, 1993)

ORDER

Before the Court is Defendant's motion to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(1), (6) & (7), F.R.Civ.P., on the grounds that the Absentee Shawnee Tribe of Indians of Oklahoma is an indispensable party which cannot be joined due to its sovereign immunity and that Plaintiff has failed to exhaust its administrative remedies.

The Court does not reach the exhaustion issue because it concludes that the Absentee Shawnee Tribe is an indispensable party in whose absence this action cannot in equity and good conscience proceed. Plaintiff does not dispute that the Absentee Shawnee Tribe is an interested party herein nor does it seriously dispute that it is a necessary party, that is, that it is a party to be joined in this action if feasible under Rule 19(a), F.R.Civ.P. 19(a), because the Tribe claims an interest relating to the subject

of this action and is so situated that the disposition of the action in the Tribe's absence may as a practical matter impair or impede the Tribe's ability to protect that interest. The Area Director of the Bureau of Indian Affairs, Department of the Interior, has taken the position that the Plaintiff Tribe and Absentee Shawnee Tribe "share a common former reservation area for purposes of fee simple acquisitions, and [therefore] neither are required to secure nonmember consents required by 25 Code of Federal Regulations, 151.8." Letter from L.W. Collier, Jr., Area Director, Bureau of Indian Affairs, United States Department of the Interior to Mr. John A. Barrett, Jr., Chairman, Citizen Band Potawatomi Indian Tribe of Oklahoma, dated September 17, 1992 (Exhibit "8" in Appendix of Documents in Support of Plaintiff's Motion for Summary Judgment. Plaintiff Tribe on the other hand contends that it has an exclusive reservation covering the 30 square-mile tract in question, "that the Absentee Shawnee have never had a reservation and certainly do not share a common reservation area with the Potawatomi" Complaint at ¶ 14, and that prior to taking in trust for the Absentee Shawnee Tribe or any tribe land within the Potawatomi Reservation boundaries, Defendant BIA Area Director is required to obtain written permission from the Potawatomi Tribe pursuant to 25 C.F.R. § 151.8. It is undisputed that the Absentee Shawnee have made applications to the BIA Area Director to place in trust for their benefit lands within the Potawatomi Reservation boundaries. No contention is made that the Absentee Shawnee Tribe has obtained from Plaintiff written consent to the placement of the lands in trust or that it is the Absentee Shawnee's responsibility under the regulation to obtain

such consent and it appears that, under the regulations, the Secretary of the Department of Interior is charged with following the authorities, policy and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes and/or ensuring that such authorities, policy and procedures are followed. *See* 25 C.F.R. §§ 151.1, 151.11 & 151.13. Nevertheless, the Absentee Shawnee Tribe has submitted applications to have land within the alleged Potawatomi reservation boundary placed in trust for it without obtaining written consent from the Plaintiff Tribe and because the BIA Area Director, as designee of the Secretary of Interior which has a trust relation to the Absentee Shawnee Tribe, has taken the position that the Plaintiff's written consent is not required for the proposed land trust acquisitions, the Court may presume that the Absentee Shawnee Tribe claims an interest in the land within the alleged Potawatomi reservation as great as or superior to the Plaintiff's and that a determination herein in the absence of the Absentee Shawnee Tribe as to whether the Plaintiff has an exclusive interest in the land in question or, conversely, as to whether that the Absentee Shawnee has any rights therein, may as a practical matter impair the Absentee Shawnee's ability to protect that interest and to have the desired land placed in trust for its benefit. The Absentee Shawnee Tribel [sic] cannot, however, be made a party herein because of sovereign immunity from suit. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Plaintiff has invited the Absentee Shawnee Tribe to intervene herein but it has declined to do so. The mere fact

that the Absentee Shawnee Tribe has received notice of the suit and could intervene cannot be used to bind the Absentee Shawnee Tribe to a judgment herein rendered in its absence and to avoid a finding that that tribe is an indispensable party herein. *See Martin v. Wilks*, 490 U.S. 755, 765, 109 S.Ct. 2180, 104 L.Ed.2d 835, 846 (1989). The Court must instead determine "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed," F.R.Civ.P. 19(b), considering the factors enumerated in Rule 19(b) and any other relevant factors.

A judgment determining that Plaintiff has an exclusive reservation covering the lands in question, that the Absentee Shawnee Tribe has no interest therein, and/or simply that the BIA or the Absentee Shawnee Tribe is required to obtain the Plaintiff's written consent to the placement of lands in trust for the Absentee Shawnee Tribe, as requested in the latter's applications, might be highly prejudicial to the Absentee Shawnee Tribe because the Plaintiff could and presumably would withhold its consent to placement of at least some of the lands in trust for the Absentee Shawnee Tribe. A judgment rendered in the absence of the Absentee Shawnee Tribe may also be prejudicial to the Defendant because Defendant could be compelled by the Absentee Shawnee Tribe to relitigate the issue of whether or not the Absentee Shawnee Tribe and Plaintiff share common reservations and could be subjected to inconsistent obligations as a result thereof.

The Court can envision no protective measures in the judgment, any shaping of relief or other measures by which prejudice to the Absentee Shawnee Tribe and/or

the Defendant can be lessened or avoided. Nor has Plaintiff suggested any viable way in which this can be done. The mere fact that the requested declarative and injunctive relief would not bind the Absentee Shawnee Tribe would not lessen the prejudice to Defendant nor the prejudice resulting to the Absentee Shawnee Tribe as a practical effect of the judgment sought, even though it would be legally nonbinding on the Absentee Shawnee Tribe. Plaintiff seems to suggest any prejudice to the Absentee Shawnee Tribe is obviated by Defendant's representation of the Absentee Shawnee Tribe's interest or by the Absentee Shawnee Tribe's ability to intervene herein if it deems Defendant's representation of its interest inadequate. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss at p. 7. However, because the United States, on behalf of which Defendant is acting owes equal allegiance as a fiduciary to both tribes, Defendant's representation of the Absentee Shawnee Tribe is inadequate. *See Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (10th Cir. 1986). The Absentee Shawnee Tribe's ability to intervene cannot be considered to mitigate the prejudice of proceeding without that tribe because intervention would require it to waive its tribal immunity and the tribe cannot be forced to make a choice between waiving such immunity or waiving its right not to have a case proceed without it. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d at 766.

The third enumerated factor to be considered in Rule 19(b) analysis is whether a judgment rendered in the absence of the Absentee Shawnee Tribe will be adequate. It appears that such a judgment would be adequate, *accord Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788

F.2d at 777, but if Plaintiff prevailed, the adequacy of the judgment might be merely temporary, since the Absentee Shawnee Tribe could relitigate the issue as against Defendant and obtain an inconsistent judgment.

Defendant has not suggested nor is the Court aware of any adequate remedy available to Plaintiff if this action is dismissed for nonjoinder. The lack of an available alternative forum or remedy is a byproduct of tribal sovereign immunity. The absence of an adequate remedy for Plaintiff is a less important or less troublesome factor when it is due to such tribal immunity. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d at 777. Indeed, immunity of a party necessary under Rule 19(a) may itself be an independent and compelling factor in determining whether in equity and good conscience an action should proceed in the absence of that immune party, militating that that party be deemed indispensable. *See Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d at 777 n. 13.

In light of the foregoing factors, the Court concludes that the Absentee Shawnee Tribe is an indispensable party herein and that this action must be and is dismissed pursuant to Rule 12(b)(7). The Court therefore finds it unnecessary to address the exhaustion issue raised by Defendant. The preliminary injunction entered herein on January 19, 1993 is hereby VACATED.

IT IS SO ORDERED this 2nd day of February, 1993.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff – Appellee,	)	
v.	)	No. 96-6219
ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendant – Appellant.	)	

ORDER

Filed June 29, 1998

Before **SEYMOUR**, Chief Judge, **LOGAN** and **MURPHY**, Circuit Judges

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Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who were in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By /s/ Opal A. Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Plaintiff – Appellee,	)	No. 96-6219
v.	)	DC No. CIV-92-2161-R
ABSENTEE SHAWNEE TRIBE OF OKLAHOMA,	)	
Defendant – Appellant.	)	

ORDER

Filed July 14, 1998

Before **SEYMOUR**, Chief Judge, **LOGAN** and **MURPHY**, Circuit Judges

The court has for consideration Appellant's Motion to Stay Mandate Pending Petition for Certiorari, and Appellee's response.

The mandate is stayed until August 3, 1998, pending the filing of a petition for writ of certiorari. If, on or before that date, this court receives notice from the Clerk of the Supreme Court of the United States that appellant has filed a timely petition for writ of certiorari, the stay shall continue until final disposition by that court.

Entered for the Court
PATRICK FISHER, Clerk of Court
/s/ Opal A. Carter
by: Opal A. Carter
Deputy Clerk

Treaty with the Potawatomi, 1867
15 Stat. 531

* * *

Article 1. It being the intention of the Government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people *without interfering with the locations made for other Indians;*

. . .

(Emphasis added.)

House of Representatives. 42d Congress, 2d Session.
Ex. Doc. No. 203
Letter from the Secretary of the Interior dated March 15, 1872

* * *

A careful examination of the treaties referred to in this communication [Treaties dated November 15, 1861, 12 Stat. 1192; March 29, 1866, 14 Stat. 763; and February 27, 1867, 15 Stat. 531] has brought my mind to the conclusion that they [the treaties] were intended to provide for all the Pottawatomies the rights of naturalization and citizenship; that it was not expected, however, that each and every one of said Pottawatomies would avail himself of this right, and that, in order to provide for those who did not become citizens, the Secretary of the Interior was authorized to set apart as a reservation for their exclusive use and occupancy, as a *"tribe"*, a tract of land, not exceeding thirty miles square, in the Indian country, and that upon payment therefor *"a patent should issue to the Pottawatomie Nation."*

I am informed by the Commissioner of Indian Affairs that all the Pottawatomies have become citizens of the United States. It would, therefore, seem that there is now no Pottawatomie *"Nation"* in existence, nor any *"tribe"* of said nation, except what is called the Prairie Band . . .

The expectations of the contracting parties, at the date of the treaty, have not been realized. The Pottawatomies are now all citizens; the nation is extinct, and no patent can be issued to the nation, as such, according to the text and unequivocal meaning of the treaty of 1867. A tract of land

thirty miles square in the Indian country has been surveyed, and many of the Pottawatomies, now citizens, have removed to it and are now residing thereon. It has not been paid for because it has never been conveyed by patent, as contemplated by the treaty, and I am of opinion that, under existing circumstances, the Secretary of the Interior has no power to cause this tract to be conveyed to the Pottawatomies. It certainly cannot be conveyed *"to the nation"*, because there is no nation. It cannot be conveyed to individual members of what was once the nation, nor to a trustee for the benefit of the nation for want of authority of law.

In consequence of these difficulties it seems to me that there is necessity for further legislation . . .

Act of May 23, 1872
(17 Stat. 159)

CHAP. CCVI. – An Act to provide Homes for the Pottawatomie and Absentee Shawnee Indians in the Indian Territory. May 23, 1872

. . . That the Secretary of the Interior be, and he is hereby, authorized and directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, shall be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band. . . .

* * *

SEC. 2. When it shall be shown to the satisfaction of the Secretary of the Interior that any Indian of pure or mixed blood of the Absentee Shawnees, being a head of a family, or a person over twenty-one years of age, has resided, continuously, for the term of three years within the thirty-mile square tract lying west of the Seminole reservation in the Indian territory, and has made substantial improvements thereon, it shall be the duty of the Secretary of the Interior to issue to said Indian a certificate of allotment for eighty acres of land, to include, so far as may be practicable, his or her improvements, together with an addition of twenty acres for each child under twenty-one years of age belonging to the family of said Indian, which certificate shall include the same provisions as are included in the certificates of allotments of lands to be issued under the provisions of the first section of this act.

Report of the Commissioner of Indian Affairs dated November 1, 1872

THE INDIAN POLICY

* * *

Pottawatomies. – * * * It having been decided, however, by the Department that, as they had all become citizens, there was, consequently, no part of the tribe remaining which could lay claim, under treaty stipulations, to the reservation in the Indian Territory, legislation was had by Congress at its last session – act approved May 23, 1872 – by which these citizen Pottawatomies were allowed allotments of land within the tract originally assigned for their use as a tribe.

* * *

Absentee Shawnees. – * * * With the view of securing to them permanent homes, provision was made in the act of May 23, 1872, whereby any Indian of pure or mixed blood of the Absentee Shawnees, being the head of a family, or over twenty-one years of age, who could show to the satisfaction of the Secretary of the Interior that he or she had resided continuously for the term of three years within said thirty-mile square tract, and had made substantial improvements thereon, should receive an allotment of eighty acres of land, to include, so far as practicable, his or her improvements, together with an addition of twenty acres for each child under twenty-one years, belonging to the family of such Indian. Although the act of May 23, 1872, provides for individual allotments of lands indiscriminately to Pottawatomies and Absentee Shawnees within the thirty-mile square tract, yet it is intended, in making such allotments, that they

shall be, so far as practicable, for the former, out of lands lying south of Little River, and, for the latter, out of land lying north of it.

* * *

"ABSENTEE SHAWNEES" AND CITIZEN POTTAWATOMIES.

Certain Indians, formerly members of the Shawnee tribe in Kansas, and for many years separated from the tribe and known as "absentee Shawnees," have been for twenty years or more residing on lands between the main Canadian and the north fork of that river, west of the Seminole reservation, in the Indian Territory. Moreover, many Pottawatomies having become citizens under the provisions of the Pottawatomie treaties of 1861, 1866, and 1867,* have within three years removed to the same locality; so that a body of Indians to the number of 2,263 are, in fact, residing upon what is known as "the thirty miles square tract west of the Seminole reserve," without any authority of law for such residence, or any color of title to the soil. It being on all accounts desirable that they should be assigned permanent homes, legislation was recommended at the last session of Congress, by which these "absentee Shawnees" and "citizen Pottawatomies"

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* The Pottawatomie treaty of 1867 made provision for a reservation, not exceeding thirty miles square, for the Pottawatomie tribe in the Indian Territory. The selection of such reservation was made in the part of the territory just described in the text, but the Pottawatomies having all become citizens, the provisions for such a reservation *to the tribe* failed as a matter of course.

should be allowed to secure individual homesteads within the tract thus occupied by them in common.

* * *

Senate. 51st Congress, 2d Session. Ex. Doc. No. 64

1. Letter from D. L. Hawkins, Acting Commissioner, Office of Indian Affairs, Department of the Interior, to Secretary of the Interior, dated May 17, 1887

Sir: The act of May 23, 1872 (17 Stats., 159), authorized and directed the Secretary of the Interior to issue certificates by which allotments of land lying within the 30 miles square tract theretofore selected for the Pottawatomie Indians, and lying next west of the Seminole Reservation, in the Indian Territory, should be made to each member of the Pottawatomie band, known as the Pottawatomie Citizen band . . .

* * *

These Indians had all been previously made citizens of the United States, and by a provision in the act they could neither acquire nor exercise under the laws of the United States any rights and privileges in the Indian Territory other than those enjoyed by members of the Indian tribes residing therein. . . .

The second section of the same act provided [for allotments to the Absentee Shawnees] . . .

Under the provisions of this act 131 allotments were made to members of the Citizen band of Pottawatomies in 1875, and the schedule of the same, approved by the Secretary of the Interior, November 23, 1875.

Three hundred and twenty-seven allotments (including children) were also made to the Absentee Shawnees and approved on the same date, (November 23, 1975).

June 2, 1882, this office recommended that certificates of allotment be issued to the Absentee Shawnees for the lands allotted in 1875, the position being taken that the Shawnees were not required to pay for their lands.

June 14, 1882, this recommendation was approved by the Department.

* * *

April 30, 1883, Special Agent Townsend reported that the Absentee Shawnees refused to take their lands in severalty.

This action resulted from the influence of the chiefs and the superstition of some of the non-progressive Indians.

* * *

Among the principle causes which have led the Shawnees to oppose a division of their lands in severalty has been the location of the Citizen Pottawatomies upon the same reservation.

In order that a clear understanding of the matter may be had, it is necessary to refer, somewhat at length, to the history of the reservation.

By the treaty of November 15, 1861, with the Pottawatomies (12 Stats. 119) provision was made whereby members of that tribe could become citizens of the United States, receive patents in fee for their lands, and be paid their proportion of the cash value of the credits of the tribe.

By the treaty of March 29, 1866 (14 Stats. 763), the beneficial provisions of the treaty of 1861 in behalf of the

prudent and intelligent members of the tribe were extended to all adult members of the tribe.

February 27, 1867, another treaty was concluded with these Indians (15 Stats. 531), the first article of which contemplated their location, if satisfactory to them and approved by the Secretary of the Interior, upon a tract of land "not exceeding 30 miles square," which "shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie Nation."

This provision was apparently intended for the benefit of those members of the Pottawatomie Nation who should elect to retain their tribal relations, but under the several treaties every member of the Pottawatomie Nation (except the Prairie Band separately provided for) became a citizen of the United States.

Notwithstanding this fact, in December, 1869, a committee of the Citizen Pottawatomies visited the Indian Territory, and selected a tract of land immediately west of the Seminole Nation, containing 900 square miles, which tract was already occupied by the Absentee Shawnees.

This selection was reported to the Secretary of the Interior November 3, 1870, and approved by him November 9, 1870.

March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomies under the treaty of 1867 could not be conveyed by patent to the Nation,

for the reason that as all the members of the tribe had become citizens the nation had become extinct.

For this reason the cost of the lands to the Government was not withheld from the process of the sales of land, as provided in the treaty.

On account of this decision legislation was invoked, which resulted in the passage of the act of May 23, 1872.

The Absentee Shawnees separated from the main body of the Shawnee Nation about the year 1840, removed to the Indian Territory, and settled on their present location.

In his annual report for 1871 John Hadley, then United States Indian agent for the Sac and Fox Agency, states that there were then located on the 30-mile-square tract 650 Absent Shawnees. He says:

"It will be remembered that these people located on the lands which they now occupy more than 30 years ago, and with little or no aid from the Government made themselves homes, and were living quite comfortably at the outbreak of the rebellion. Most of them were cultivating more or less land and numbers had more or less stock. But as they remained loyal they had to abandon their homes and seek shelter in the North." (Annual Report for 1871, page 494).

A feeling of uneasiness and insecurity has existed among these people since the settlement of the Pottawatomies upon the lands exclusively occupied by the former for more than 30 years.

The two tribes have not assimilated, and do not agree well together.

* * *

Recommendations have been made to Congress for legislation establishing a dividing line in this reservation, but without result.

* * *

2. Letter from A.B. Upshaw, Acting Commissioner, Office of Indian Affairs, Department of the Interior, to N.S. Porter, Esq., United States Special Agent to make allotments of lands in severalty to Indians, dated August 10, 1887

Sir: Under date of May 24, 1887, the President granted authority for making allotments of lands in severalty, under the provisions of the act of February 8, 1887, to the Citizen Pottawatomie and Absentee Shawnee Indians located upon the 30-mile square tract lying west of the Seminole Reservation in the Indian Territory.

Under this authority you will proceed to the Sac and Fox Reservation and said 30-mile-square tract for the purpose of making such allotments, in conjunction with Agent Moses Neal.

* * *

[With regard to the Pottawatomie Citizen Band, it is stated:]

Under the provisions of said section 131 allotments were made to members of the Citizen Band of Pottawatomies in 1875, and the schedule of the same was approved by the Secretary of the Interior November 23, 1875.

The Secretary of the Interior having decided that, as the nation had become extinct by reason of all its members being made citizens, the land could not be patented to the nation, no certificates of allotment have been issued, except in eleven cases, schedule inclosed, in which the cost of the lands to the United States was refunded by the allottees.

* * *

[With regard to the Absentee Shawnee Tribe, it is stated:]

Under the provisions of said second section 327 allotments (including children) were made to the Absentee Shawnees, and approved November 23, 1875.

* * *

As certain conditions were imposed by the act of 1872, and it being the evident intention of the act of 1887 to give each Indian a separate allotment of land without cost and without conditions as to cultivation, etc., the Secretary has decided that allotments shall be made both to Pottawatomies and Absentee Shawnees in quantity as provided in the general allotment act, . . .

The joint occupation of this reservation by the two tribes of bands of Indians has long been a source of vexation to each, particularly to the Absentee Shawnees, who have repeatedly requested that a dividing line between them be established.

The line suggested is the Little River, the Pottawatomies to be contained to the south side of said river and the Shawnees to the north side, and the allotments heretofore made have been upon that basis.

* * *

3. Letter from J.D.C. Atkins, Commissioner, Office of Indian Affairs, Department of the Interior to the Secretary of the Interior, dated December 28, 1887

* * *

I do not see that these Indians [Potawatomies] have any cause for complaint. They were allotted lands in Kansas, made citizens of the United States, and paid their pro rata share of the funds of the tribe. After they had sold their allotted lands and wasted their substance in riotous living they were allowed to select a tract of land in the Indian Territory, upon which other Indians had been living prosperously and contentedly for more than 30 years. Within this tract they were allowed the privileges of purchasing from the Government a certain quantity of land at the cost price of the same. In 15 years but eleven members have availed themselves of this privilege. When they were given this tract they were informed by this office that is was expected that they would confine themselves to the south side of the Little River. They have now been informed that each member of the band, including those living in Kansas who have never been upon the reservation (except married women) could have a certain quantity of land without expense, for which patents would be issued subject to two conditions, first: That they must select their lands within a certain portion of the reservation containing at least half of its area; and, second, that the quantity of land in some cases would be smaller than the quantity which they had the right to purchase. I do not believe that the circumstances require

any modification of the instructions given to Special Agent Porter.

S. Exec. Doc. No. 78, 51st Cong., 1st Sess. (1890)
Letter from the Secretary of the Interior in response to Senate Resolution of March 10, 1890

* * *

The provisions in the treaty of 1807, for setting apart a reservation in the Indian country, was apparently intended for the benefit of those members of the Pottawatomie Nation who should elect to retain their tribal relations, but under the provisions of the several treaties every member of that nation became a citizen of the United States. Under date of March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomie Nation under the treaty of 1867 could not be conveyed by patent to the nation, for the reason that all the members of the tribe having become citizens of the United States, the nation had become extinct, and for this reason the cost of the lands to the Government was not withheld from the proceeds of the sale of lands in Kansas as provided in the treaty. On account of this decision and in view of the fact that the Absentee Shawnee Indians had separated from the main body of the Shawnee Nation about the year 1846, and had settled within the tracts selected as a reservation by the Pottawatomies, legislation was invoked which resulted in the passage of an act of Congress, approved May 23, 1872 (17 Stat., 159). This act provided for the issuance of certificates by which allotments of land lying within the tract selected for the Pottawatomie Indians should be made to each member of the band known as the Pottawatomie Citizen Band.

* * *

Under date of May 23, 1887, the Secretary of the Interior decided that both the Citizen band of Pottawatomies and the Absentee Shawnees having been located on their reservation under the act of 1872, and being so located, they come within the provisions of the act of February 8, 1887, providing for the allotment of lands in severalty to Indians (24 Stat., 388), and that allotments should be made thereunder to both bands, without reference to the act of 1872, thereby relieving the Citizen Potawatomies from the liability to pay for the lands allotted to them, as required by the act of 1872, and three hundred and sixty-nine allotments to the Citizen Pottawattomies and fourteen to the Absentee Shawnees have been made in the field, and Special Agent N. S. Porter has recently been instructed to complete the allotment of lands on the reservation. It has been hitherto held by the Department that the Citizen band of Pottawatomies do not own the 30-mile square tract selected under the treaty of 1867, but that under the act of 1872 the individual members of that band and of the Absentee Shawnees are entitled only to such amount of land as may be allotted to them.

It has been hitherto held by the Department that the Citizen band of Pottawatomies do not own the 30-mile square tract selected under the treaty of 1867, but that under the act of 1872 the individual members of that band and of the Absentee Shawnees are entitled only to such amount of land as may be allotted to them.

House of Representatives. 51st Congress, 2d Session. Report No. 3481

January 16, 1891. Mr. Perkins, from the Committee on Indian Affairs, submitted the following report: [To accompany H. R. 11681.]

* * *

It is claimed by the Interior Department that the $119,790.75, which was retained by the Government as payment for this reservation (in the Territory), was in fact not so retained, but was paid to said Indians, and that the title to said reservation for that reason never passed.

* * *

As to the Absentee Shawnees, it seems that some time about 1840 they left the main band then located upon the Shawnee Reservation in Kansas, and after roaming and hunting for some time settled down upon some of the country embraced within the limits of this reservation, where they have remained ever since. They were not there by any treaty or Executive order, but the Government has long known of their presence there. They have been industrious and wholly self-supporting, and during the war were loyal to the United States. They have also been receiving allotments under said severalty act. The Commissioners agreed that they should be paid for the relinquishment of their claims, after taking allotments, $65,000, which item, and the $160,000, to the Pottawatomies, make up the amount of the appropriation in the bill.

* * *

Act of March 3, 1891
(26 Stat. 989)

(26 Stat. 1016)

Sec. 8. The following agreement, . . . with the Citizen Band of Pottawatomie Indians in Oklahoma on the twenty-fifth day of June, eighteen hundred and ninety, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, . . . and others, on behalf of the said Citizen Band of Pottawatomie Indians, is hereby accepted, ratified and confirmed, to wit:

* * *

ARTICLE I.

The Citizen Band of Pottawatomie Indians of the Indian Territory, in consideration of the fulfillment of the promises hereinafter made, hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country in the Indian Territory . . . [exact same legal description of subject area as appeared in Section 9 for the Absentee Shawnees] . . . containing an area of five hundred and seventy-five thousand eight hundred and seventy and forty-two one hundredths, acres of land.

ARTICLE II.

Whereas certain allotments of land have been heretofore made, and are now being made to members of said Citizen Band of Pottawatomie Indians, according to

instructions from the Department of the Interior at Washington . . . , and according to said instructions other allotments are to be made, it is further agreed that all such allotments so made shall be confirmed . . . *And provided further,* That all such allotments shall be taken on or before February eighth, eighteen hundred and ninety-one, when any right to allotment, in any one, shall be deemed waived and forever cease to exist.

* * *

ARTICLE IV.

It is further agreed, as a further and only additional consideration for such relinquishment of all title, claim, and interest of every kind and character in [an] *and* to said lands, that the United States will pay to said Citizen Band of Pottawatomie Indians, in said tract of country, within four months after this agreement shall have been ratified by Congress, the sum of one hundred and sixty thousand dollars for making homes and other improvements on the said allotments. . . .

* * *

Sec. 9. The following agreement entered into on behalf of the United States with the Absentee Shawnee Indians, on the twenty-sixth day of June, eighteen hundred and ninety, and signed by said Commissioners on the part of the United States, and by White Turkey, Chief, and five others, on the part of said Absentee Shawnee Indians, is also hereby accepted, ratified and confirmed, to wit:

* * *

ARTICLE I.

The Absentee Shawnee Indians of the Indian Territory in consideration of the fulfillment of the promises hereinafter made, hereby cede, relinquish and surrender, forever and absolutely, to the United States, all their claim, title and interest of every kind and character in and to the following described tract of country in the Indian Territory, . . . [exact same legal description of subject area as appeared in Sec. 8 for the Pottawatomie Indians] . . . containing an area of five hundred and seventy-five thousand eight hundred and seventy and forty-two one hundredths, acres of land.

ARTICLE II.

Whereas certain allotments of land have been heretofore made, and are now being made to said Absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress . . . and according to said instructions other allotments are to be made, it is further agreed that all such allotments so made shall be confirmed . . . *provided further,* that all such allotments shall be taken on or before January 1st, 1891, after which time and up to February 8, 1891, the alloting agent, then on said reservation shall make allotments to those Absentee Shawnees resident in said tract of country, who have failed or refused to take their allotments as aforesaid, and such allotments so made by such alloting agent shall have the same force and effect as if the selections were made by the Indians in person. After said date of February 8th, 1891, any right to allotment hereunder or

by Act of Congress, shall be deemed waived and forever cease to exist.

* * *

ARTICLE IV.

It is further agreed, as a further and only additional consideration for such relinquishment of all title, claim and interest of every kind and character, in and to said lands, that the United States will pay to said Absentee Shawnees in said tract of country, as soon as may be after this agreement shall have been ratified by Congress, and under the direction of the Commissioner of Indian Affairs, the sum of sixty five thousand ($65,000.00) dollars for making homes and other improvements on their said allotments. . . .

THE POTTAWATOMIE AND ABSENTEE SHAWNEE RESERVATION

*By Berlin B. Chapman**

Within what is now the approximate limits of Pottawatomie County, a reservation for the Pottawatomies and Absentee Shawnees was established and dissolved during the last third of the nineteenth century. This article tells of the forces that induced these Indians to come to Indian Territory, and the procedure by which the reservation was established.

There were in Kansas in 1867 about 2,180 Pottawatomies.[1] Just west of Topeka they occupied a

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* Doctor Berlin B. Chapman, Associate Professor of History, Oklahoma A. and M. College, at Stillwater, has contributed a number of interesting articles on the history of various Indian land tracts and reservations in Oklahoma, published from time to time in *The Chronicles of Oklahoma*. – *Ed.*

[1] The spelling of the name of this Indian tribe has been established as "Potawatomi," the form having been agreed upon by the Bureau of American Ethnology and the U.S. Indian Bureau and cited by Charles J. Kappler in *Laws and Treaties*, Vol. I (Indian Affairs. Statutes, Executive Orders, Proclamations, and Statistics of Tribes. Compiled to December 1, 1902.), Appendix I, p. 1021. The spelling "Potawatomi" is phonetic, harmonizing the various forms of the name found in government reports and in more than fifty treaties made by the United States with the tribe, beginning January 9, 1789. The established spelling of the name follows nearest that found in the Treaty of 1837 concluded at Washington, D.C., thirty years before the reservation was established for the Potawatomi tribe in the Indian Territory. The Treaty of 1837 gave the spelling "Potawatomie." In establishing the form agreed upon, the scientific presentation of American Indian languages by means of the English alphabet was followed, the ending "i" taking the place of "ie" which is rarely, if ever, used in spelling Indian proper names, "ie" having been

reservation thirty miles square.[2] The United States by the treaty of 1846 guaranteed to them the full and complete possession of the reservation as their land and home forever.[3] The condition of the tribe was peculiar. Under treaty provisions a large number of them had taken lands in severalty, with the intention of becoming citizens of the United States, withdrawing their shares of the common funds of the tribe and dissolving entirely their tribal relations.[4]

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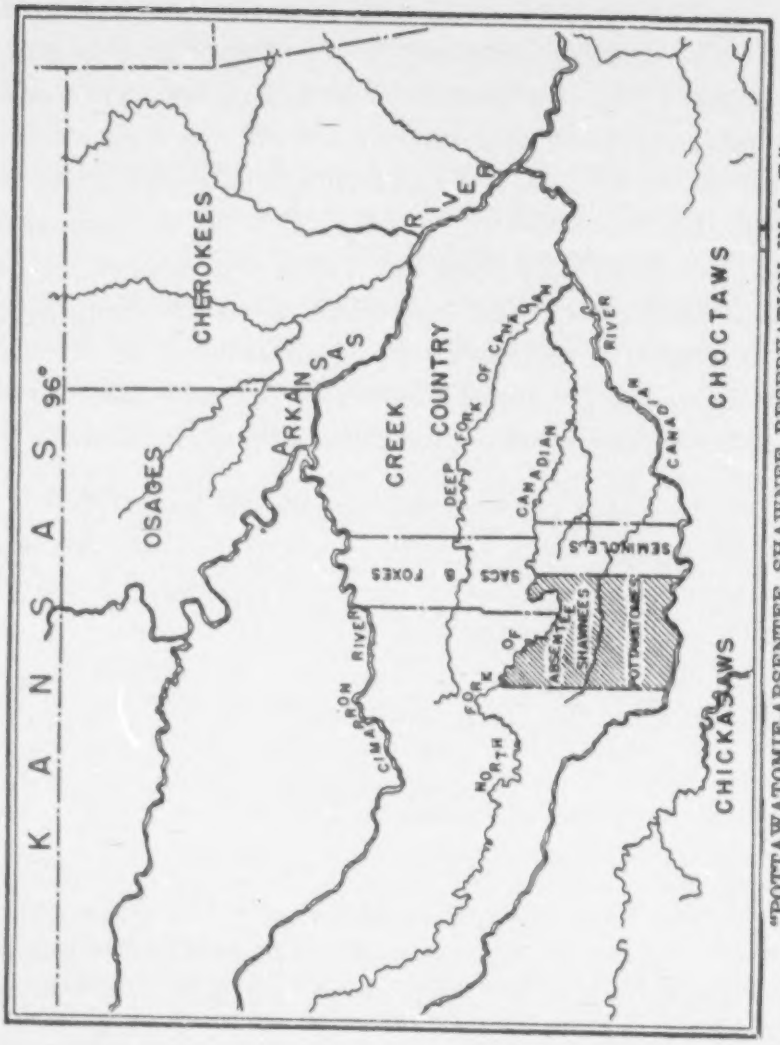
formerly used in English for "y" and now used as a diminutive suffix with the idea of playfulness or endearment (birdie, Susie). Despite the establishment of the logical, phonetic form "Potawatomi" which is used to-day by the Library of Congress, Kappler's compilations of Indian documents, and leading historical societies and organizations interested in Indian history, as well as by historians, some of the U. S. courts and government departments in this country continue to spell the name "Pottawatomie" in published reports and documents. This spelling of the name is also found on the map of Oklahoma to-day in that of "Pottawatomie County" in accordance with the Constitution of the State (Article XVII, Counties and County Seats) adopted in 1907. The Oklahoma Constitution provided the continuation of the county in the same area and with the same name as it had been previously organized under the Territory of Oklahoma. At the time of the opening of the Potawatomi reservation to white settlement on September 22, 1891, two counties were formed from the tract, known as County A and County B. Later, by a vote of the people in that part of Oklahoma Territory, County A was named "Lincoln County" and County B, "Pottawatomie County." – Ed.

[2] Royce, *Ind. Land Cessions*, p. 824; map. 27.

[3] Kappler ii, 557.

[4] Treaty of Nov. 15, 1861, *ibid.*, p. 824; treaty of March 29, 1866, *ibid.*, p. 916. Commissioner N. G. Taylor on March 18, 1868, reported that 1,522 Pottawatomies had received allotments in severalty under the former treaty and that 149,965 .66 acres of land had been so allotted; Taylor, to Sec. Interior, OIA (Office of Indian Affairs), *Report Book 17*, pp. 212-213.



"POTTAWATOMIE-ABSENTEE SHAWNEE RESERVATION IN I. T."

The Prairie band, consisting of about one fifth of the tribe, had steadily opposed the making of this noble experiment.[5] In the northeast corner of the reservation the band occupied and held in common a tract of land eleven miles square, set apart for them pursuant to the treaty of 1861. They were satisfied with the usages of their ancestors. They were not inclined to engage long in manual labor; nor could they understand how their social status could be improved by each individual selfishly striving to acquire for the exclusive use of himself or his immediate family all the wealth he could command.

Article eight of the treaty of 1861 provided that if at any time thereafter any band or bands of the Pottawatomie nation should desire to remove from the homes provided for them in the treaty, it should be the duty of the Secretary of the Interior to have their proportionate part of the lands which might be assigned to the

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[5] "In the series of treaties, mostly made in 1854-55 with tribes in Kansas most advanced in civilization, it was intended to bring about a gradual extinction of those tribes by merging them in the white population, and separate holdings of land were to be set apart for such as desired to individualize their property. After more than ten years trial, the experiment has to a great extent, proved a failure, many of the most enlightened of the Indians declaring that they prefer selling out their property, and with their tribe, removing to a new home in the Indian Country, where they can retain their tribal relations, and still improve in education and civilization as the Cherokees and other tribes of that country have done, and under their own laws." – Com. N. G. Taylor to Sec. Int., April 12, 1867, OIA, *Rpt. Book 16*, p. 258.

The place of the Pottawatomies and Absentee Shawnees in the general plan of the government to remove Indians to Indian Territory is shown in Grant Foreman, *The Last Trek of the Indians.*

tribe appraised and sold, and invest such portion of the proceeds thereof as might be necessary in the purchase of a new home for such band or bands.

For more than a decade after the execution of the treaty the Office of Indian Affairs looked with favor upon the removal of the Prairie band to a reservation in the Indian Territory, which removal was not destined to occur. In his annual reports for 1862 and 1863 Superintendent H. B. Branch recognized the propriety of taking necessary steps to dispose of the lands of this band and of permitting them to locate in some part of the Indian Territory.[6] A portion of the band in the summer of 1864 went to southern Kansas and probably to the Indian Territory for the purpose of spending the winter in hunting and in looking at the country. The local agent, with the concurrence of the Commissioner of Indian Affairs, encouraged them to select in the Indian Territory a suitable home for their band or tribe.[7]

Many of the Pottawatomies who received allotments and severed their tribal relations were sufficiently intelligent to be intrusted with the management of their affairs. Their command of the English language was adequate for their needs; and they were inclined to labor, economize and get gain. But their environment was such that they could not well carry out the ideals they entertained. White settlers in Kansas, who to the Indian tribes there were legions of devils personified, intruded upon

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[6] *Indian Affairs, 1862*, p. 98; *Ind. Aff., 1863*, p. 235.

[7] *Ind. Aff., 1864*, pp. 35; 371.

the lands of Indians and depredated almost with impunity. It was also true that there were many Pottawatomies, willing to become citizens of the United States, whose range of vision did not penetrate farther than their present enjoyment. When their shares of the tribal wealth were placed at their disposal they were content to eat and drink merrily, waste their substance with riotous living, and take no thought for the morrow.

In 1866 the Pottawatomies were reported to be in a more prosperous condition than any other tribe in Kansas.[8] Agent Luther R. Palmer was of the opinion that it would be advantageous to the tribe if a treaty could be negotiated with the government providing a reservation in the Indian Territory for such of them, holding lands in common or in severalty, as should choose to remove thereto.[9] He believed that it would be but a short time before such of the balance of the tribe as might find it difficult to manage their affairs and sustain themselves in contact with the whites would gladly throw up their allotments and follow their friends to the new reservation.

At Washington on February 27, 1867, Commissioner Lewis G. Bogy, Superintendent Thomas Murphy and other duly authorized representatives of the United States entered into a treaty with a delegation of Pottawatomies, in which the Prairie band was not directly represented. The preamble of the treaty stated that the Pottawatomies believed it was for the interest of their

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[8] *Ind. Aff., 1866,* p. 246.

[9] Palmer to Thomas Murphy, Sept. 17, 1866, *ibid.,* p. 264.

tribe that a home should be secured for them in the Indian country south of Kansas, while there was yet an opportunity for the selection of a suitable reservation there.[10] At that time it was the intention of the government that a commission should visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove.

In article one of the treaty it was agreed that a delegation of the Pottawatomies might accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location should be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, should be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as provided in the treaty, the said tract should be patented to the Pottawatomie nation: Provided, that if the said Pottawatomies should prefer to select a new home among the Cherokees, by agreement with the Cherokees, for a price within the means of the

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[10] *15 Statutes*, 531; Bogy to Sec. Int., Feb. 27, 1867, OIA, *Rpt. Book 16*, pp. 183-185. In a letter of January 7, 1868, Murphy stated that the Prairie band "refused to visit Washington last winter, and was not included in the treaty made by the delegates of that tribe in the treaty which they made." – Murphy to Act. Com. C. E. Mix, OIA, Pottawatomie, I. 630-1868.

Pottawatomies, the government would confirm such agreement.

It was provided in article two that in case the new reservation should be selected upon the lands purchased by the government from the Creeks, Seminoles or Choctaws, the price to be paid for said reservation should not exceed the cost of the same to the government of the United States; and the sum to be paid by the tribe for said reservation should be taken from the amount which might be received from the sale of certain lands in the Pottawatomie reservation in Kansas, which amount should be the common property of the tribe, except the Prairie band, who should have no interest in said reservation to be purchased as aforesaid, but in lieu thereof should receive their pro rata share of the proceeds of the sale of said lands in money, as the same might be received.[11]

It was provided in article four that a register should be made, under the direction of the agent and business committee of the tribe, within two years after the ratification of the treaty, which should show the names of all members of the tribe who should declare their desire to remove to the new reservation, and of all who should desire to remain and to become citizens of the United States. Provision was made whereby members of the tribe who should desire to remove as aforesaid might sell their

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[11] This provision was added to the treaty by the Senate in the form of an amendment. Article twelve of the treaty provided that the members of the Pottawatomie tribe who held their lands in common should be entitled to their share in the ownership of the new reservation.

allotments and expend a portion of the proceeds arising therefrom in removing to the new reservation.

The Senate on July 25, 1868, consented to the ratification of the treaty with certain amendments which were accepted by the Pottawatomies on August 4. In October, Palmer recommended that arrangements be made at an early day for selecting a home in the Indian Territory in accordance with the terms of the treaty, and for the removal thereto of the Pottawatomies having allotments who should not decide to become citizens of the United States.[12] He stated that any considerable delay in making the necessary preparations for removal would prove detrimental alike to the Pottawatomies who should remove and to those who should elect to remain in Kansas.

O. H. Browning, Secretary of the Interior, on November 21 appointed Shelby T. Shipley, Milton W. Reynolds and E. Reese Roxbury as a commission to proceed to the Indian Territory in company with delegations from the Sacs and Foxes of the Mississippi and the Pottawatomies to make a selection of a new reservation for each of said tribes in pursuance of the provisions of the treaty with the former tribe concluded February 18, 1867, and the treaty concluded with the latter tribe February 27 of the same year. On December 2, 1868, the Commission was instructed to describe carefully the reservations that might be selected, by their exterior boundaries so that they might always be identified readily. The Commission proceeded without delay to Atchison, Kansas. They found dissension and division among the bands of the

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[12] *Ind. Aff., 1868*, p. 264.

Sac and Fox tribe in the selection of a delegation; and it appears that a delegation was not selected until after the Office of Indian Affairs directed that Agent Albert Wiley appoint one if the tribe did not do so promptly.

The Commission, paid by the day, early realized that their work might not last long, and without success, they asked the "favor" of being employed to remove the Sacs and Foxes of the Mississippi and the Pottawatomies to the reservations that might be selected for them in the Indian Territory.[13] They seem to have known the folly of hurrying when their pay was proportionate to their own delay. The Interior Department, although anxious to affect the removal of the Indians to the Indian Territory, was considerate of the Commission, and pressed down on them slowly, the cold hand of business economy.[14]

[HANDWRITTEN COPY OF PHOTOSTAT – PAGE OF ORDER OF THE SECRETARY OF THE INTERIOR SETTING ASIDE THE POTAWATOMI RESERVATION IN I. T. HAS BEEN OMITTED]

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[13] Shipley et al. to Com. N. G. Taylor, Jan. 5, 1869, OIA, Cent. Supt., S. 8-1869. The chief clerk of the Central Superintendency reported that the Sacs and Foxes of the Mississippi and the Pottawatomies had "their eye upon the country" between the ninety-sixth meridian and the Arkansas, promised to the Osages by the treaty of May 27, 1868. The tract became Osage County. See A. C. Farnham to Murphy, Jan. 27, 1869, OIA. Cent. Supt., M. 96-1869.

[14] By telegram of March 23, 1869, Taylor instructed Murphy to send the Commission with the delegates to the Indian Territory without further delay. On April 2 he advised Murphy that the "Commission must not delay."

The Pottawatomies did not wish to send a delegation to the Indian Territory during the winter season, giving as a further reason besides the great discomfort and inconvenience of travel, that it was the worst time in the whole year to select land and judge its quality. They also claimed that their ponies were too poor to travel. The Commission, soon after their arrival in Kansas, held a council with the Pottawatomies who agreed to have a delegation ready to start for the Indian Territory by February 1, but they positively refused to start a delegation before that time. When the appointed time came, the roads were still considered impassible and the matter of sending a delegation was postponed a month. It was reported on March 1, that a delegation of the tribe was on its way to the Indian Territory.[15] The delegation went no farther than Topeka however, assigning as a reason therefor that they desired to await the return of one of their chief men from Washington, and that they did not wish to go farther.

The Commission informed the Pottawatomies of their intention to leave the Sac and Fox agency in Kansas for the Indian Territory on March 29, 1869. The Commission left on that day, but no delegation of Pottawatomies joined them. On April 2 N. G. Taylor, Commissioner of Indian Affairs, instructed Murphy to insist that the Pottawatomies send a delegation to the Indian Territory, and if they should refuse, to advise the Commission to select

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[15] Tel. from A. C. Farnham to Murphy, March 1, 1869, OIA, Sac. and Fox, M. 185-1869; J. E. Clardy to Shipley et al., March 1, 1869, OIA, Cent. Supt., R. 161-1869.

for them their future home.[16] Murphy on April 8 reported that the tribe had selected a delegation who would start for the Indian Territory on April 26.[17]

The Commission designated as a reservation for the Pottawatomies the tract of land bounded on the east by the reservation they designated for the Sacs and Foxes of the Mississippi, on the south by the Deep Fork of the Canadian, on the north by the Cimarron, and on the west by a line drawn south from a point on the Cimarron, twenty-five miles up that stream from the Sac and Fox reservation.[18] In a report to Commissioner E. S. Parker on June 9 the Commission said: "If all that has been accomplished for the advancement and progress of the Pottawatomies is not to be lost [,] they should be speedily moved to their new homes in the Indian Territory where they will be placed under better counsels and influences."

It appears that the Commission selected the tract of land for the Pottawatomies without the consent of the duly authorized agent or delegates of the tribe. Since the treaty of 1867 provided that the location to be selected for the Pottawatomies should be satisfactory to them, Parker on August 4, 1869, instructed Superintendent Enoch Hoag to consult with the chiefs of the tribe and, if possible, obtain their consent to go upon the lands designated for them. and if they should refuse to remove as contemplated by the said treaty, he should report the fact and

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[16] Tel. of April 2, 1869 (OIA (Large) *Letter Book 89*, p. 409.

[17] Murphy to Taylor, April 8, 1969, OIA, Cent. Supt., M. 303-1869.

[18] Shipley et al., to E. S. Parker, June 9, 1869, OIA, Cent. Supt., S. 205-1869, p. 16.

state what further action was, in his opinion, necessary to accomplish the object.[19] The Pottawatomies however protested against the selection of lands made for them by the Commission.

Palmer on September 20 reported that the Pottawatomies were still desirous of making an early selection of lands in the Indian Territory for a reservation, and were wishing that the government would send, at a fitting season of the year, a commission to assist them in the matter.[20] He stated that the tribe could commence their removal to the Indian Territory within a year, and in a short time nearly all, with very little aid from the government, would be settled permanently in their new home.

In December the tribe selected a delegation who proceeded to the Indian Territory and selected for a reservation the tract of land bounded on the east by the Seminole country, and extending west between the Canadian and the North Fork of the Canadian far enough to embrace nine hundred square miles.[21] On February 26, 1870, Hoag reported that some of the Pottawatomies were preparing to remove to the tract of land selected by the delegation. He recommended that the Secretary of the Interior promptly approved this selection, stating that the voluntary removal of the Pottawatomies thereto would pave the way for other lingering remnants of tribes to follow

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[19] Parker to Hoag. Aug. 4, 1869, OIA, (Large) *Letter Book 92*, pp. 14-15.

[20] Palmer to Hoag, Sept. 20, 1869, *Ind. Aff., 1869*, pp. 372-373.

[21] Hoag to Parker, Feb. 26, 1870, OIA, Pot., H. 869-1870; George L. Young to Hoag, Feb. 24, 1870, *Ibid.*

their example. Before the Pottawatomies should emigrate to their proposed reservation, Parker considered it necessary to determine the correct dividing line between the United States and the Creek nation and also the western boundary line of the Seminole country.[22]

The Prairie band was cold to inducements, offered it to dispose of its lands and acquire an interest in the tract of land selected by the Pottawatomie delegation. Hoag and Agent Joel H. Morris were ardent advocates of the removal of the tribe to this tract. In the autumn of 1870 many of the Pottawatomies who had taken lands in severalty were preparing for the sale of their farms and for removal to the tract. Some of them were looking forward anxiously to the fulfillment by the government of the provisions for the purchase of their proposed reservation in the Indian Territory.[23]

On October 28 Hoag reported that he encouraged those anxiously awaiting the action of the government, to remove to the proposed reservation and commence making improvements.[24] In accordance with Parker's recommendation, Columbus Delano, Secretary of the Interior on November 9 approved as a reservation for the Pottawatomies the selection of lands made by their delegation, and granted authority for the removal of the Pottawatomies thereto, with the direction that, until the western boundary of the Seminole country should be

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[22] Parker to Sec. Int., March 11, 1870, OIA, *Rpt. Book 19*, pp. 243-244.

[23] Morris to Hoag, Sept. 1, 1870, *Ind. Aff., 1870*, pp. 275-278.

[24] Hoag to Parker, Oct. 28, 1870, OIA, Pot., H. 1556-1870.

surveyed and marked, the Pottawatomies should locate so far west of the Seminoles as not to intrude upon their lands.[25] The western boundary of the Pottawatomie reservation was the Indian Meridian, six miles beyond the western limits of present Pottawatomie County. The reservation embraced 575,870.42 acres of which 353,133.6 acres were in the Seminole cession of 1866, and 222,736.82 acres were in the Creek cession of the same year. At the rates named in the Seminole and Creek cession treaties, the cost of the lands to the United States was $119,791.08.

The treaty of 1867 provided that the tract of land approved by the Secretary of the Interior should be set apart as a reservation for the exclusive use and occupancy of the Pottawatomie tribe. When Delano approved the selection of lands made by the Pottawatomie delegation, there were located in the northeast part thereof about 650 Absentee Shawnees. The Absentee Shawnees had separated from the main body of the Shawnee tribe about 1846 and settled in this locality.[26]

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[25] Delano to Parker, Nov. 9, 1870, OIA, *Record Letters Sent*, No. 11, p. 7.

[26] Reference to the Absentee Shawnees was made in the article "Pioneer Beginnings at Emmanuel, Shawnee" by the Reverend Franklin C. Smith in *The Chronicles of Oklahoma*, Vol. I, No. 1 (Spring, 1946), p. 8 and fn. 1. The Absentee Shawnee group also included other bands of Shawnees that had separated from the main portion of the tribe about the beginning of the 19th Century. One band settled in Texas and was a party to the "Sam Houston Treaty" with the affiliated Indian tribes and the Republic of Texas on February 23, 1836. Previous to this, another band of Shawnees was living in the Red River country in the Indian Territory. The noted full blood Shawnee leader "Big Jim" was born in Texas in 1834, and in 1872

A treaty concluded by the United States with the tribe on May 10, 1854, provided that, on the tribal reservation in the vicinity of Olathe, Kansas, members of the tribe might make individual selections of land of two hundred acres each.[27] It was also provided that Shawnees, for years separated from the tribe, who should return to and unite with the tribe, within five years from the proclamation of the treaty, should likewise be entitled to individual selections of two hundred acres each. It was further provided that whatever portion of the surplus lands of the reservation should remain unassigned, after the expiration of said five years, should be sold as provided in the treaty, and that the proceeds of the sales should be retained in the Treasury of the United States until the expiration of ten years from the proclamation of the treaty, after which time, should said absent Shawnees not have returned and united with the tribe, all the moneys then in the Treasury, or that might thereafter be received therein, as proceeds of the sales of such surplus land, should be applied to, or invested for, such beneficial or benevolent objects among the Shawnees, as the president, after consultation with the Shawnee council, should determine. The Absentee Shawnees in the Indian Territory did not return to the tribal reservation within the time specified in the treaty.

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became the chief of the tribal band known as "Big Jim's Band of Absentee Shawnees." – Ed.

[27] Kappler ii, 618. The interests of the Absentee Shawnees in land were recognized in unratified treaties made with the Shawnee tribe March 18, 1864; March 1, 1866; and March 4, 1867. See OIA, *Record of Treaties*, No. 2, pp. 113; 204; 364.

Congress by resolution of April 7, 1869, made provision for the sale to settlers of the lands set apart by the treaty of 1854 for the benefit of certain absentees of the Shawnee tribe.[28] It was stated in the preamble of the resolution that the beneficial interest of the absentees in the lands was absolutely forfeited by reason of their continued absence and nonaffiliation with the tribe.

According to an agreement entered into between the Cherokee nation and the Shawnee tribe on June 7, 1869, the sum of $50,000 arising from the proceeds of the sale of the lands should be paid to the Cherokees as a partial consideration for the right of the Shawnees, including the Absentee Shawnees in the Indian Territory, to settle upon unoccupied lands of the Cherokees east of the ninety-sixth meridian in accordance with the provisions of article fifteen of the Cherokee treaty of 1866.[29] It was

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[28] 16 *Statutes*, 53.

[29] Agreement of June 7, 1869, *S. Reports*, 49 Cong. 1 sess., ix (2336), Appendix pp. 353-354. The agreement was approved by the President on June 9, 1869.

In Washington on May 11, 1869, Principal Chief Lewis Downing and other duly authorized representatives of the Cherokee nation entered into an agreement with a duly authorized delegation of the Shawnee tribe making provision whereby Shawnee Indians might settle upon any portion of Cherokee lands west of the ninety-sixth meridian, not occupied by other Indians under existing laws or treaty stipulations, to the extent of 160 acres for each member of the Shawnee tribe. It was suggested to the Interior Department by the attorney for the Cherokees that it was the intention of the parties to the agreement that the Shawnees should occupy the lands just west of the ninety-sixth meridian. On June 2 Secretary Cox stated that as the articles of the agreement were in conflict with the Osage treaty of 1868, pending before the Senate, he did not feel at

provided in the agreement that all Shawnees who should elect to avail themselves of the provisions of the agreement should register their names, and permanently locate in the Cherokee country, as provided in the agreement, within two years from the date thereof. Otherwise they should forfeit all rights under the agreement. The Absentee Shawnees failed to register their names as provided in the agreement.

During 1871 and the early months of the following year the Absentee Shawnees and a large number of Pottawatomies had a feeling of insecurity, and were uneasy in regard to their rights in and to lands within the reservation designated for the Pottawatomies. On October 28, 1870, Hoag reported that the Pottawatomies expressed a willingness that the Absentee Shawnees remain undisturbed on the lands they had selected as neighbors. In August, 1871, Agent John Hadley stated that the Absentee Shawnees entertained fears that they would have to abandon their improvements, and seek homes elsewhere.[30] During the following winter and early spring they were, according to Hadley, much discouraged and unsettled because the Pottawatomies expressed an intention to encroach upon them and threatened to take possession of their farms and homes.[31]

Under date of February 19, 1872, Chiefs John Sparney and Joseph Ellis and seven councilmen of the Absentee

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liberty to submit them to the President for his approval. Cox to Parker, June 2, 1869, OIA, *Rec. Letters Sent*, No. 9, pp. 349-350. The agreement is in OIA, Shawnee, I. 333-1869.

[30] *Ind. Aff., 1871*, p. 494.

[31] *Ind. Aff., 1872*, p. 245.

Shawnees addressed a petition to the President stating that they had located and made improvements on the tract of land between the North Fork of the Canadian and Little River, bounded on the east by the Seminole country and on the west by a line drawn due south from a point on the North Fork of the Canadian, seventeen miles up that stream from the Seminole country.[32] It was set forth in the petition that the Absentee Shawnees desired to remain on the lands and leave them as an inheritance to their children. It was also set forth that the Absentee Shawnees had received nothing for the lands which the government had given them in Kansas, and the petitioners asked that the Absentee Shawnees be given a title to the above described tract of country, in lieu of those lands. Finally, it was observed that the Absentee Shawnees had been true to the government, in peril as in peace, even when allegiance cost them loss of property.

Hadley and Hoag recommended that the request of the Absentee Shawnees be granted. In transmitting the petition to Commissioner F. A. Walker on March 20, Hoag stated that the Pottawatomies had expressed a willingness not to disturb the Absentee Shawnees, but asked the government to extend their reserve westward, covering this additional area.[33]

Before the close of 1870 a portion of the Pottawatomies, having allotments in Kansas, manifested an interest in subdividing the new reservation in the Indian

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[32] The petition is in OIA, Shawnee, H. 1247-1872.

[33] Hoag to Walker, March 20, 1872, *ibid.*

Territory so that those removing thereto might have reasonable equality in regard to timber, water and fertile soil.[34] Before the close of another year a large number of Pottawatomies, citizens of the United States, had disposed of their lands, squandered their money, and were anxiously awaiting an official determination of what rights they had in the reservation in the Indian Territory. They requested their agent to ask that the lands of the reservation be surveyed and paid for as stipulated in the treaty of 1867.[35]

After an examination of certain treaties concluded with the Pottawatomies, Secretary Delano was of the opinion that they were intended to provide for all the Pottawatomies the rights of naturalization and citizenship; that it was not expected, however, that each and every one of the Pottawatomies would avail himself of this right, and that, in order to provide for those who did not become citizens, the Secretary of the Interior was authorized by the treaty of 1867 to set apart as a reservation for their exclusive use and occupancy, as a tribe, a tract of land, not exceeding thirty miles square in the Indian country, and upon payment therefor a patent should issue to the Pottawatomie nation.

In a letter of March 17, 1872, to James G. Blaine, Speaker of the House of Representatives, Delano said:[36]

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[34] J. H. Morris To Hoag, Dec. 16, 1870, OIA, Pot., H. 1698-1870.

[35] Same to same, Nov. 3, 1870, OIA, Pot., H. 895-1871.

[36] Letter of March 15, 1872, *H. Ex. Docs.*, 42 Cong. 2 sess., x(1513), no. 203. See also Veale v. Maynes, 23 Kan. 1.

I am informed by the Commissioner of Indian Affairs that all the Pottawatomies have become citizens of the United States.[37] It would therefore, seem that there is now no Pottawatomie "nation" in existence, nor any "tribe" of such nation, except what is called the Prairie band, in the amendment to the second article of the treaty of February 27, 1867, and this band, by the express words of the amendment, have no interest in said reservation.

The expectations of the contracting parties, at the date of the treaty, have not been realized. The Pottawatomies are now all citizens; the nation is extinct, and no patent can be issued to the nation, as such, according to the text and unequivocal meaning of the treaty of 1867. A tract of land thirty miles square in the Indian country has been surveyed, and many of the Pottawatomies, now citizens, have removed to it and are now residing thereon. It has not been paid for because it has never been conveyed by patent, as contemplated by the treaty, and I am of opinion that, under existing circumstances, the Secretary of the Interior has no power to cause the tract to be conveyed to the Pottawatomies. It certainly cannot be conveyed *"to the nation"*, because there is no nation. It cannot be conveyed to individual members of what was once the nation, nor to a trustee for the benefit of the nation, for want of authority of law.

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[37] On March 11, 1872, Hoag informed the Office of Indian Affairs that according to the business committee of the Pottawatomies, there were no members of the tribe other than the Prairie band in Kansas, who had not accepted citizenship and duly qualified as such. Walker to Delano, March 12, 1872, OIA, *Rpt. Book 21*, p. 313.

Commissioner Walker on March 30 directed that the Absentee Shawnees be permitted to remain in undisturbed possession of their lands and improvements.[38] In April he observed that under the provisions of the treaty of 1854 they had received no allotments of land on the Shawnee reservation, neither had they received or been entitled to receive any of the proceeds of the surplus lands of the reservation, sold after allotment.[39] The Absentee Shawnees were unprovided with any permanent home in the possession of which they could be protected by virtue of any compact or agreement. According to Walker, there were on the thirty miles square tract west of the Seminole country, 2,263 Pottawatomies and Absentee Shawnees, without any authority of law for such residence, or any color of title to the soil.[40] By an act of May 23, 1872, provision was made whereby these Indians might acquire allotments on the said tract of land.[41]

Allotment began in 1875 and extended over a period of fifteen years.[42] In 1891 Congress ratified agreements with the Pottawatomies and Absentee Shawnees under

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[38] Waler to Hoag, March 30, 1872, OIA, (Large) *Letter Book 106*, pp. 313-314.

[39] Walker to Sec. Int., April 15, 1872, OIA, *Rpt. Book 21*, pp. 407-408.

[40] *Ind. Aff., 1872*, p. 89.

[41] *17 Statutes*, 159.

[42] *S. Ex. Docs.*, 51 Cong. 1 sess. ix (2686), no. 78, pp. 18-21.

which allotment was completed and the reservation dissolved.[43] A money compensation was made to the Pottawatomies and Absentee Shawnees for relinquishing their claims to the reservation. In the dissolution of the reservation 215,679.42 acres were allotted to 1,498 Pottawatomies, and 70,791.47 acres to 563 Absentee Shawnees. The surplus lands, about 275,000 acres, were opened to white settlement in 1891. In that year T. J. Morgan, Commissioner of Indian Affairs, observed that the reservation selected by the Pottawatomies pursuant to their treaty of 1867 had not been paid for by them or patented to the Pottawatomie nation.[44]

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[43] The agreements are in 26 *Statutes*, pp. 1016-21.

[44] Morgan to Sec. Int., June 13, 1891, OIA, *Land Letter Book 218*, p. 315.

Without citing proof for his statement, Willis Van Devanter, Assistant Attorney General, said in a letter to the Secretary of the Interior, December 22, 1900: "The reservation for the Citizen Band of Pottawatomies in Oklahoma, was paid for out of money belonging to the Indians (Treaty of February 27, 1867, 15 Stat., 531), and the allotment thereof to the individual members of the band was simply a dividing up of their property." 30 *Land Decisions* 377.